Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

ELIZABETH RIDGEWAY, *et al.*,
Petitioners,

v.

PFIZER, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GARY GREEN
COUNSEL OF RECORD
LARRY M. KELLER
SIDKOFF, PINCUS & GREEN
1101 MARKET STREET
SUITE 2700
PHILADELPHIA, PA 19107
(215) 574-0600

MORTON B. WAPNER
WAPNER, NEWMAN & WIGRIZER
115 SOUTH 21ST STREET
PHILADELPHIA, PA 19103
(215) 569-0900

ATTORNEYS FOR PETITIONERS

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

1. May a district court deny arbitrarily, with no reason articulated, an *unopposed*, timely motion made under Fed.R.Civ.P. 54(d)(2)(C) that requested, as provided in the Rule, that the court afford class members an opportunity for adversary submissions with respect to motions for attorneys' fees, and may the district court also exclude class members from participating in, and raising objections at a fee setting hearing, where the result was that more than $16 million in fees were deducted from the class members' settlement fund, and awarded to class counsel in a largely unchallenged, fee-setting proceeding?

2. Where attorneys for objecting class members were acknowledged on the record as having performed services that benefitted the class generally and in particular, improved and enhanced a class action settlement by tens of millions of dollars when compared to the less valuable settlement appointed class counsel proposed originally, and where the judge who both appointed class counsel and approved the settlement then recused himself from the fee-setting process due to his personal relationship with appointed class counsel, could the recused judge, nonetheless, in the midst of his period of recusal, and after a new judge was appointed as his replacement, reinsert himself into the proceedings to enter an Order that summarily, arbitrarily and with no factual record, denied entirely the fee request of the attorneys for the objecting class members to punish them for requesting an evidentiary hearing on disputed issues of fact relating to fees, and for daring to challenge the fee request of the appointed class counsel with whom the judge had a relationship?

3. Where the Sixth Circuit dismissed objecting class members' original, direct appeal of an Order approving the settlement in a 23(b)(3) mass-tort case, holding that absent class members lack appellate standing unless their motion to intervene had been granted, and where the objecting class members had filed a motion to intervene that was pending at the time the original appeal was dismissed, was it proper for the district court to deny the motion to intervene on the grounds that the district court did not want to create appellate standing for the objecting class members, thus insulating the district court's procedures for and decisions relating to the approval of a class settlement from any appellate review?

4. Where the Sixth Circuit requires class members to intervene to have standing to appeal matters relating to the certification of a Rule 23(b)(3) class, and its settlement, and if the class members do file a motion to intervene, are the class members' rights to due process violated if the district court exercises discretionary authority to deny the motion for the purpose of insulating its decisions from any appellate review on the merits?

5. Where the district court entered judgement approving a Rule 23(b)(3) class settlement on September 9, 1992, and where on September 25, 1992, for purposes of obtaining appellate standing to appeal the district court's judgment, Appellants-class members filed a motion to intervene, and where the Sixth Circuit's Order dated December 16, 1996 affirming the denial of Appellants' motion to intervene is a proper and timely subject of this Petition for a Writ of Certiorari, may Appellants also seek reversal of the orders of the district court certifying a worldwide settlement class in a products liability case and

approving a global class action settlement on the grounds that the rulings are in direct conflict with this Court's decision in *Amchem Products, Inc. v. Windsor*, ____US ___, 1997 WL345149 (U.S.); No. 96-270 (6/25/97)?

PARTIES TO THE PROCEEDING

In addition to petitioners Elizabeth Ridgeway, Rosemary Grunsby, and Fred Grunsby, each of whom appeared as Class Members-Appellants in the Sixth Circuit proceeding, and their attorneys, Sidkoff, Pincus and Green, P.C. and Wapner, Newman & Wigrizer, respondents Arthur Ray Bowling, *et al.*, appeared as Plaintiffs-Appellees and respondents Pfizer, Inc. and Shiley Incorporated appeared as Defendants-Appellees before the Sixth Circuit.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit dismissing petitioners' appeal is reproduced in the petitioners' appendix at A1 (there is no official citation to this order). The order of the United States Court of Appeals for the Sixth Circuit denying petitioners' petition for rehearing *en banc* is reproduced in petitioners' appendix at A3.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1996. A1. Petitioners filed a timely petition for rehearing on December 24, 1996, which was denied by the court of appeals on February 28, 1997. A3. By order dated May 6, 1997, petitioners were granted an extention of time to file their petition for writ of certiorari until June 28, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Overview

This petition arises out of the serious derelictions of a district court in its procedures and rulings in the context of a class action settlement and the awarding of counsel fees. The district court's errors evaded any form of serious appellate review because through the course of five separate appeals, the Sixth Circuit chose to either frustrate Appellants[1] by

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[1] "Appellants" shall refer to objecting class members Ridgeway, Grunsby, et al. The term "Law Firm Appellants" shall refer to Sidkoff, Pincus & Green, P.C. and Wapner, Newman & Wigrizer.

adopting new standing requirements that contravened prior Sixth Circuit precedent, or to simply ignore Appellants' arguments when dismissal of Appellants' appeal on standing grounds was not an option.

In a palpable departure from the law as enunciated in *Amchem Products, Inc. v. Windsor*, ___ US ___, 1997 WL345149 (U.S.), No. 96-270 (6/25/97), the district court rubber stamped a quick and obviously collusive settlement of a world-wide, Rule 23(b)(3) mass-tort class action involving allegedly defective heart valves. Thereafter, despite statements of the district court and opposing counsel on the record that counsel for Appellants-objecting class members had benefitted the class and were deserving to share in court awarded counsel fees, and despite irrefutable evidence that Appellants' counsel improved and enhanced the settlement by tens of millions of dollars, the district court judge (who had recused himself from the fee-setting process due to his personal relationship with the class counsel he appointed) punished Appellants' counsel by entering an Order during the period of his recusal (when he thus had no legitimate authority to act) that denied, summarily and without the benefit of any factual record, the entire fee request of Appellants' counsel.

Moreover, Appellants and virtually all other absent class members were then excluded from the fee-setting process. The district court compounded its error when it arbitrarily, with no reason articulated, denied summarily Appellants' *unopposed*, timely motion made under Fed.R.Civ.P. 54(d)(2)(C) that requested, as provided in the Rule, that the court afford Appellants, as class members, an opportunity for adversary submissions with respect to the motions for attorneys' fees. A5. Because the district court excluded Appellants and other class members from participating in and raising objections at the fee setting hearing, the result was that more than $16 million in fees

were deducted from the class members' settlement fund and were awarded to class counsel in a largely unchallenged, and uncontested fee-setting proceeding. This award was made despite a record showing the absence of any litigation work or even the normal risk that an attorney on a contingent fee usually assumes.

Description Of The Proceedings Below

All throughout the so-called Rule 23(e) "fairness hearing", the district court refused to allow the creation of any evidentiary record, and instead, relied on and permitted only the argument of counsel; yet, much of which counsel said was demonstrably false, and would have been refuted for the record by objective evidence, if the court had allowed any evidence to be introduced.

This handling of this case by the district court, if it ever saw the light of day, would be the stuff of a major scandal touching a biased (and perhaps self-interested) judge, a nationally known class-settling lawyer and a huge, international corporation. Possibly because of the potential for scandal, and probably because what happened to Appellants may have been viewed as *business as usual* for class action settlements handled in that particular district court, the Sixth Circuit refused to review or consider the merits of the substantive issues the objecting class members and their counsel raised. First, the Sixth Circuit dismissed the direct appeal the class members originally filed (seeking review of the district court's refusal to follow the established strictures of Rule 23 for certifying a class and approving a settlement).[2] A259. In dismissing the appeal, the three-judge

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[2] Case No. 92-3973; *Ridgeway, et al. v. Pfizer, et al.*, October Term, 1993.

panel of the Sixth Circuit, in an unpublished opinion, held that absent class members must intervene to have standing to appeal.[3] A299.

Appellants then became mired in a maze of procedural traps set by the district court and the Sixth Circuit. Appellants filed a Rule 60(b) motion that demonstrated fraud had been perpetrated at the Rule 23(e) Fairness Hearing when the district court relied explicitly on the settlement's proponents' representations that the class members' individual cases had *no settlement value* because no case had ever been settled, and also that funds in the settlement that were to be used for research that had not been started.[4] A156. In actuality, as was revealed in subsequent newspaper articles and elsewhere, the defendants in the case had agreed prior to the fairness hearing to a secret settlement with 341 persons who opted out of the class to pay a total of $31 million in damages, thus belying the *no-settlement-value* representation (A212); and other information leaked out that showed the very research that was supposed to have not yet existed and was to be funded by the settlement, in actuality had been part of an on-going research project defendants had undertaken

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[3] To reach this decision, the panel was required to disobey the Sixth Circuit's own Internal Rule (Sixth Circuit Internal Operating Procedure 22.4), as well as its rule that only an *En Banc* court could overrule extant authority (Sixth Circuit Internal Operating Procedure 22.4.1). Thus, in dismissing the appeal, the panel effectively overruled *sub silencio* two prior Sixth Circuit cases, *Sertic v. Cuyahoga Lake, Etc., Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972); *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942), which convincingly had allowed appellate standing to class members. *See, Wright, 7B Fed. Practice and Procedure*, §1787 at 360-61; (citing *Cohen); 3B Moore's Federal Practice*, §23.80 (5) at Practice (citing *Cohen*).

[4] *Bowling, et al. v. Pfizer, et al.*, 143 F.R.D. 141 (S.D.Ohio 1992).

years earlier to appease the FDA, and in fact, the discovery of diagnostic devices that the settlement was supposed to finance had already been discovered. A182.

The district court denied the Rule 60(b) motion, and when Appellants appealed, the Sixth Circuit dismissed the appeal on the same lack of standing grounds it used to justify the dismissal of the first appeal. RA368[5] There was a key distinction however in the status of the Appellants by the time of the 60(b) appeal. The district court had entered judgement on its Order approving the class settlement on September 9, 1992, and on September 25, 1992, for purposes of obtaining appellate standing to appeal the district court's judgement, Appellants-class members filed a Motion to Intervene. Unfortunately for Appellants, they had made the mistake of filing their notice of appeal on September 17, 1992. Hence the district court refused to rule on the Motion to Intervene because it asserted it lacked jurisdiction, and the Sixth Circuit affirmed. A141; A1. Therefore, in the first appeal, because the notice of appeal predated the Motion to Intervene, the Sixth Circuit arguably had a legitimate basis for not considering the fact that a Motion to Intervene was pending when it dismissed the original appeal (although if it was inclined to consider the original appeal on its merits, the Sixth Circuit's own doctrine of de facto intervention would have provided the means). *See, United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *Sales v. Marshall*, 873 F.2d 115 (6th Cir.1989); *Smart v. Coca Cola Bottling Corporation*, 337 F.2d 950 (6th Cir.1964).

On the other hand, because the Motion to Intervene was pending in the district court as a live, *sub judice* motion at the time the denial of the Rule 60(b) motion was appealed,

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[5] Citations to "RA" are to the record on the appeals filed with the Sixth Circuit in this case.

it was incumbent on the Sixth Circuit to heed that fact and to either recognize standing by the Appellants or to honor Appellants' request that the appeal of the ruling denying Rule 60(b) motion be remanded so the district court could first decide the Motion to Intervene.[6]

On April 5, 1994, the district court finally disposed of Appellants' motion to intervene that had been filed originally on September 25, 1992 when it denied the motion and a related motion Appellants had filed under Rule 59(e).

After Appellants' initial appeals challenging the approval of the settlement were exhausted, the Law Firm Appellants timely filed a fee petition seeking to be compensated from the common class fund for the services they had performed in causing the settlement to become enhanced by tens of millions of dollars, and in causing the fairness hearing to explore issues crucial to the class that would have eluded examination but for their objections. RA599. The Law Firm Appellants proved further in their papers that the novel, unique and special features of the *Bowling* settlement (which appointed class counsel argued entitled him to be awarded $30 million in fees from the class settlement funds) were lifted from a written settlement proposal the Law Firm Appellants had conceptualized and submitted to Defendants as early as *1989*, in connection with their efforts to settle a Pennsylvania state court class action case -- thus providing Defendants and appointed class counsel with a blueprint of how heart valve litigation might be settled

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[6] Due to the delay of the district court in deciding the Motion to Intervene and a related Rule 59(e) motion, coupled with the deadline for appealing the denial of the Rule 60(b) Motion, Appellants were forced to appeal the denial of the Rule 60(b) order while the Motion to Intervene was still being considered by the district court. This was called to the attention of the Sixth Circuit, and a remand was requested by Appellants, to no avail. RA409.

on a class action basis. Moreover, it was demonstrated that this was a blueprint that obviously was put to use in designing the settlement that ultimately was approved in *Bowling*. (*Id.*) For these reasons and others, the Law Firm Appellants asserted a right to share in the attorneys' fees the court was to award.

The Law Firm Appellants expected the court would award them a substantial fee since Judge Spiegel, the judge who had approved the settlement, Appointed Class counsel (Mr. Chesley), and counsel for Defendants *all* had gone on record in attesting to the enhancement of the financial aspects of the settlement and the other benefits the class derived from the efforts of the Law Firm Appellants' work and objections in the course of the Fairness Hearings. Indeed it was an indisputable fact that the efforts of the Law Firm Appellants improved the terms of the settlement in this case:

> "Mr. Chesley:
>
> > ... and the consideration is the objectors, and the fact that certain things were brought to the court's attention by Mr. Green and Mr. Wapner and they would be entitled to a fee in that regard. And so there is one fee - -
>
> Judge Spiegel:
>
> > I indicated if they had done anything to improve the lot of the class, that they would be entitled to file an application for fees. I think they did.
>
> Mr. Chesley:
>
> > Yes, they did, your Honor."

(RA310 at 6, 7).

In addition, Defendants' attorney Alan Goott, Esquire, during an ancillary hearing in Appellants' state court class action, held before the Honorable Craig G. Lord on December 29, 1992, acknowledged that the conduct and efforts of the Law Firm Appellants directly enhanced the *Bowling* settlement so that it became much more valuable to the class than the proposed settlement agreement Appointed Class Counsel originally asked the court to approve. Mr. Goott told Judge Lord that the Law Firm Appellants made a significant contribution to the enhancements achieved in the *Bowling* settlement, particularly relating to the provision adding $10 million for spouses of the class members.[7] RA 599. Mr. Goott noted further the significant contribution of the Law Firm Appellants to the substantially enhanced benefits for valve replacements surgery for class members. *Id.* at "C", p.20. Mr. Goott confirmed also to Judge Lord that one of the Law Firm Appellants, Mr. Green, was the *most* vocal participant at the Fairness Hearing in *Bowling* and "...certainly [was] a major factor in the enhancement of the settlement fund. In addition, Defendants' counsel agreed that the settlement proposal made by the Law Firm Appellants in the state court case was used as a foundation for the *Bowling* settlement. RA202 at 85.

Although Judge Spiegel had presided over the *Bowling* case from its inception, through the Fairness Hearings and up until all of the fee petitions had been filed, because of his personal relationship with Mr. Chesley, Judge Spiegel recused himself from consideration of any of the fee petitions. The Honorable John F. Nangle, Senior District Court Judge from the U.S. District Court for the Eastern

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[7] For example, the original settlement agreement Mr. Chesley asked the court to approve gave spouses no benefits whatsoever even though the settlement agreement cut off their rights to sue for loss of consortium.

District of Missouri, was then designated by Chief Justice Rehnquist to hear the *Bowling* case. A137.

The designation of Judge Nangle was precipitated when Chief Judge Merritt of the Sixth Circuit executed a "Certificate of Need" at Judge Spiegel's request. RA 761. The Certificate of Need specifically provided that the need existed for the assignment of a judge to hear the *Bowling* case. (*Id.*)

This was followed by an "Order of Transfer" dated July 27, 1995, signed by Judge Spiegel and by Judge Nangle that said,

> "The above-captioned case is hereby transferred from the docket of the Honorable S. Arthur Spiegel to the docket of the Honorable John F. Nangle, United States Senior District Judge for the Eastern District of Missouri, sitting by designation in the United States District Court for the Southern District of Ohio, **on the issue of the award of attorneys' fees and costs only**. It should be noted that any appeal from Judge Nangle's ruling will be made to the United States Court of Appeals for the Sixth Circuit." (emphasis added) (A135).

Thereafter, an *ex parte* telephone conference call was conducted by Judge Nangle with Mr. Chesley, counsel for Defendants and Mr. Wolfman, counsel for Public Citizen, an Amicus (who had his own pending application for attorneys' fees) in which the protocol and procedure for the hearing on fee requests was discussed. Significantly, although the conference discussed and established a protocol and procedure for the hearing on Appellants' attorneys' fee application, the Law Firm Appellants were not invited to participate in that

conference call, and were not even told such a conference call was to take place.

Soon after the private conference call, on August 11, 1995, Judge Nangle issued an "Order Setting Hearings on Applications For Attorney's Fees". A.14. This Order scheduled the fee applications hearing for September 14, 1995. It set a special session lasting from 9:30 a.m. until 11:30 a.m. to consider only the fee applications of Appointed Class Counsel and Mr. Wolfman, and directed that, "only Messrs. Chesley, Wolfman and a representative of Defendants, shall participate as attorneys in said hearing.[8] (*Id.*) The August 14th Order went on to provide that a separate hearing on the Law Firm Appellants' application for attorneys' fees was to follow on September 14, 1995, from 11:30 a.m. until "no later than 1:00 p.m.", thereby limiting Appellants' hearing to a mere one and one half hours. (*Id.*). However, in this hearing on the fee application of the Law Firm Appellants, the participants were to include Messrs. Chesley and Wolfman, counsel for the Defendants and the Law Firm Appellants.[9] (*Id.*)

Remarkably, the August 14th Order varied significantly from a Stipulation signed by counsel of the participants to the *ex parte* telephone conference. A79. Under paragraph 5 of the Stipulation, the Appellants (and any other class member) *would have* been permitted to raise objections to the application for fees filed by other attorneys

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[8] In other words, the Law Firm Appellants were barred from the hearing that was to set the attorneys' fees for the other lawyers who were competing for a portion of the common fund.

[9] The application for fees filed by the Law Firm Appellants was therefore to be open to challenge by Messrs. Chesley and Wolfman, although as noted, the Law Firm Appellants were barred from challenging their fee applications.

(including class counsel). The Stipulation provided in part at paragraph 5 that:

> "*All* counsel and their experts, if any, or entities whose petitions for an award for attorneys' fees and/or expenses, or *objectors* thereto, will be heard and shall have the opportunity to address the Court if they so choose, and to respond to the Court's questions. Counsel for defendants may participate as well, if they so choose. *The Court will hear argument on the issues of the amount of attorneys fees and expenses to be awarded and any objections thereto." (Id.)* (emphasis added)

Pointing out the basic unfairness of Judge Nangle's lack of reciprocity in who was allowed to challenge whose fee applications, and complaining about the private telephone conference which set the procedure on Appellants' attorneys' fee application without Appellants being invited to participate, Appellants filed on August 18, 1995, a motion to "Participate In The Hearing On Applications Of Messrs. Chesley and Wolfman". A.68. In that motion, Appellants pointed out that Judge Spiegel had not allowed the creation of a factual record during the fairness hearings, there were numerous factual disputes which were in the record and apparent inconsistencies in the fee application of Appointed Class Counsel, and that Judge Nangle would be obliged to make factual determinations before the award of attorneys' fees and costs. (*Id.*) Therefore, the Appellants requested that they be allowed to participate in the hearing on the fee applications of Messrs. Chesley and Wolfman and that an evidentiary hearing be held. (*Id.*).

A few days later, the Law Firm Appellants received in the mail Appointed Class Counsel's "Memorandum In Opposition to the Requested Award of Fees and Expenses" of the Law Firm Appellants that raised issues of fact which were highly disputed by Appellants. RA633. Based upon Judge Spiegel allowing no discovery or an evidentiary hearing relating to the class action settlement during the Rule 23(e) fairness hearings[10], the fact that there was no factual record whatsoever in the case, Judge Nangle's total unfamiliarity with the case and the large number of factual inaccuracies in Appointed Class Counsel's Memorandum, the Law Firm Appellants followed up on August 25, 1995 with a motion filed with Judge Nangle that specifically asked for an evidentiary hearing and discovery to resolve the obvious factual disputes on crucial issues. A55. Further, Appellants also filed a Motion to strike Mr. Chesley's opposition brief to the Law Firm Appellants' attorneys' fees application noting it alleged unsupported facts, and also Mr. Chesley's persistent opposition to all discovery and requests for evidentiary hearings in this case.[11] RA635.

Having received no ruling from the court, on August 30, 1995 the class member Appellants filed a formal written request and motion under Fed.R.Civ.P. 54(d)(2)(C) seeking "Adversary Submissions and Objections" to the application for fees. A48. In this request under Rule 54(d)(2)(C), the Class Member Appellants pointed out that it was their *right* to have such adversary submissions, and they requested that the court direct the matter to be heard on oral sworn testimony and/or depositions as contemplated by

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[10] RA76; RA216; RA248; RA298; RA443; RA536; RA634; and RA638.

[11] RA76; RA216; RA248; RA298; RA443; RA536; RA634; and RA638.

Fed.R.Civ.P. 43(e). In Appellants' request, they directly challenged the time records of Class Counsel and Special Counsel; advised the Court that the case had been settled without being litigated; and advised Judge Nangle that Appellants had a pending motion to intervene. (*Id.*) The motion under Rule 54 (d)(2)(C) was never opposed.

Although the fee setting responsibility had been transferred completely from Judge Spiegel to Judge Nangle (A135), amazingly, in an Order dated September 1, 1995 (A11), Judge Spiegel took it upon himself to re-designate himself as the judge responsible for the fee setting process, but only for the singular purpose of punishing the Law Firm Appellants by effectively reversing Judge Nangle's Order dated August 14, 1995, that had set a hearing on the fee petition of the Law Firm Appellants, and denying (without a hearing or an evidentiary record) their fee petition, summarily and outright. (*Id*).[12] Thus, despite having gone on record endorsing the Law Firm Appellant's entitlement to a fee, in his September 1, 1995 Order, Judge Spiegel denied all fees to the Law Firm Appellants, saying:

> "Fourth, it is the conclusion of the Court that the applications of counsel for the Pennsylvania class objectors, Messrs. Sidkoff, Pincus & Green, P.C. and Wapner, Newman & Wigrizer for awards of fees and costs should be denied. These attorneys did not contribute any financial benefit to the plaintiff

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[12] There was no authority for Judge Spiegel to re-designate himself to make an Order, and his action not only smacks of impropriety, it is *ultra vires* and an abuse of his office as a federal judge, since at no time did either the Chief Justice of the Supreme Court or the Sixth Circuit Court revoke the Order of July 28, 1995 designating Judge Nangle to hear the *Bowling* case.

class in their activities in this litigation" (A11).[13]

Judge Spiegel usurped the authority of Judge Nangle to decide which lawyers *should* get fees because Judge Spiegel's September 1, 1995 Order improperly directed Judge Nangle to find that the attorneys' fee applications of Messrs. Wolfman and Chesley (and "Special Counsel" who affiliated with Appointed Class Counsel during the Fairness Hearing), "should be considered" because they had "rendered valuable services to the plaintiff class". A11.

Based on Judge Spiegel's Order dated September 1, 1995, Judge Nangle then rescinded his original Order dated August 11, 1995 (A7) that had scheduled a session for hearing the fee application of the Law Firm Appellants, and issued in its place an "Amended Order" (A7) that eliminated

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[13] There was a need for an evidentiary hearing since there were material disputed facts when Mr. Chesley's fee application and Law Firm Appellants' fee application were compared. Since this was a case that was virtually filed as a settlement class, and no litigation took place from which Judge Spiegel could have informed himself about what any of the fee applicants had done or what services they had performed, and because Judge Spiegel had explicitly barred the formation of any evidentiary record during the fairness hearing (despite Appellants' repeated written and oral motions asking for discovery as well as sworn testimony at the fairness hearing), Judge Spiegel had no factual record or other legitimate basis to rule that the Law Firm Appellants made no contribution to the settlement. In fact, Judge Spiegel did not even have a copy of Law Firm Appellants' large fee application and supporting appendix since they had been filed with Judge Nangle and were not reviewed by Judge Spiegel. No fee related findings of fact were or properly could have been made by Judge Spiegel addressing any of the matters raised by Law Firm Appellants in their written application for fees and accompanying exhibits, nor did Judge Spiegel explain his own contradiction or why he was ignoring the statements on the record made by Mr. Chesley and Defendants' counsel, all of which further supported the Law Firm Appellants' right to a fee.

and barred any consideration of the fee application of the Law Firm Appellants. Judge Nangle then set a hearing date of September 14, 1995 for the applications of Messrs. Chesley and Wolfman. However, Judge Nangle's September 5, 1995 Order further prohibited any class member, Appellants or anyone else not affiliated with Appointed Class Counsel from participating in the hearing on the remaining fee applications. (*Id.*) Furthermore, in a companion Order dated September 5, 1995, Judge Nangle summarily denied all of the motions the Law Firm Appellants and the Class Member Appellants had filed.[14] A5. The hearing on the fee applications was held on September 14, 1995, and not one class member spoke at the hearing. RA677. During the fee-setting hearing, with only Amicus, Public Citizen being invited and allowed to challenge Mr. Chesley's fee application, Judge Nangle was handicapped in analyzing Mr. Chesley's fee application due to the lack of a real adversary.

Furthermore, because the hearing was designed to avoid any real fact-finding, not one fee-petitioning attorney was required to be tested by cross examination. RA677. Rather, the hearing followed the prior pattern in this case of not allowing the creation of a record of facts adduced under the Federal Rules of Evidence. Remarkably, Judge Nangle accepted a self-serving, and overtly inaccurate stipulation into the record. RA677. Obviously, Appellants did not agree to the stipulation, and indeed, had no advance knowledge of it. Judge Nangle relied on the stipulation, describing it as "a

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[14] These motions were Appellants': (1) Motion to Participate in the Hearing on the Application of Messrs. Chesley and Wolfman; (2) for Discovery and an Evidentiary Hearing; (3) to Strike Class Counsel's and Special Counsel's Memorandum in Opposition to the Law Firm Appellants' fee application; and (4) Request Under Fed.R.Civ.Pro. 54(d)(2)(C) by the Class Member Appellants for Adversary Submissions and Objections.

comprehensive stipulation covering all issues relating to the fee applications before the court". RA800. The stipulation was signed by class counsel, counsel for Defendants (who offered no objections of any kind at the fee setting hearing) and counsel for Public Citizen. Judge Nangle commented that Public Citizen played the primary role of "objector" to the fee petitioning lawyers' joint fee application, and concluded, in a lily gilding fashion, "Thus, the stipulations submitted to the Court were the result of agreement by parties in an adversarial posture." (R. 800: Memorandum, p. 18).

Without a *real* adversary, such as the Appellants proposed to be, Judge Nangle was unable to tell that Public Citizen had a very narrow agenda[15] that precluded it from being the "adversary" to the fee petitioning lawyers that Judge Nangle knew was necessary for the fee awarding process to work as designed. Instead, Judge Nangle heard unchallenged falsehoods from Mr. Chesley that later formed the basis of the court's fee award. An example is Mr. Chesley's statements about whether he had any basis to accept the settlement in the first place, since he admitted he took no discovery in this case. Thus, at the September 14th fee hearing, with nobody present who was there to act as a truth detector, Mr. Chesley stated to Judge Nangle:

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[15] This is seen in the written opposition to the fee applications that Public Citizen filed, where it focused its discussion on why the lodestar method should be used, and said not one word about some of the other salient issues such as the palpably false misstatements in Mr. Chesley's fee application about the course of negotiations, the actual work Mr. Chesley did, and the nature of the "risk" Mr. Chesley faced, all of which later formed the basis for Judge Nangle to justify the attorneys' fee award to Mr. Chesley and his "Special Counsel" allies of $10.25 million and the right to seek additional attorneys' fees in the amount of $6.25 million. Clearly, in limiting its attack, Public Citizen did not speak for Appellants.

> "*I would not get into the negotiations until I saw discovery and materials.* They (Defendants) had a depository in Irvine California, and we sent people out there, who live in Irvine, California. And I said --rather than my taking a bunch of depositions -- 'I want informal discovery. I want the documents. I want the studies. I want the materials.' And we did that on what would be--a lot of courts have now copied that kind of discovery. . ." (emphasis added) (RA677 at 41).

The problem with Mr. Chesley's statement to Judge Nangle is that it appears to be outrageously false. The records show that by November 19, 1991, Mr. Chesley and counsel for Defendants had already met with Judge Spiegel in chambers and described the completed settlement (RA33); and with no further "negotiations", a month and a half later, Judge Spiegel perfunctorily signed Mr. Chesley's Order approving notice to the class of the same settlement that was introduced at the fairness hearing. RA44; RA48. The first time that any lawyer affiliated with Mr. Chesley visited the document depository maintained in Irvine, California by Defendants was when Ms. Hondorf, who was Mr. Chesley's employee-associate, visited Irvine, California on *May 12, 1992*. This is seen both in Ms. Hondorf's time records where she wrote, "Review of documents in Irvine" on May 12, 1992 (RA276, Ex. A); and it is seen as well in the list of expenses Mr. Chesley submitted for reimbursement to the court which likewise shows only one visit by a member of Mr. Chesley's staff to Irvine, California on May 11-12 1992. RA 276, Ex. B. *No other person affiliated with Mr. Chesley's law firm submitted any time records or expenses for reviewing any documents of the Defendants in Irvine prior to May 11, 1992.*

In fact, this very point had been raised by Appellants in Judge Spiegel's court and in the Sixth Circuit, and Mr. Chesley never denied that the first visit his firm made did not occur until May 11, 1992. Of course, Judge Nangle, as a judge newly assigned to a discrete aspect of the case was totally unfamiliar with the record, would not have knowledge that Mr. Chesley was "putting him on" when he misled Judge Nangle into believing he had taken "informal discovery" at Defendants' document warehouse.[16] Regrettably, Judge Nangle relied on Mr. Chesley's misrepresentations in calculating his fee.[17]

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[16] Mr. Chesley stated in an answer to a motion in which he sought more time that, as of October of 1991, *he had not yet visited the Irvine, California document depository,* and as noted, less than a month later, he was meeting in Judge Spiegel's chambers with Defendants' counsel and informing Judge Spiegel of the completed settlement agreement. Mr. Chesley thus wrote in that October 22, 1991 pleading,

> "Very little discovery, aside from that requested by Defendants going to the issue of class certification, has yet been conducted in this case. Plaintiffs served a very detailed set of interrogatories upon Defendants; in response Plaintiffs were invited to the reading room at Shiley headquarters to review documents specifically related to plaintiffs' questions." (RA24).

[17] Judge Nangle found in support of his award of fees to Mr. Chesley,

> "[Mr. Chesley] provided services in the following areas during the period leading up to the Court's approval of the settlement:. . . Investigation prior to filing the Complaint; . . . Settlement Negotiations . . . Discovery." RA800.

Judge Nangle seemed to know that he was not really conducting an adversarial proceeding. To his credit, Judge Nangle acknowledged his handicap in setting the fees. He said his mission was to learn "who did what, and when, and how much did they do." RA677 at 10. Judge Nangle stated openly at the outset, "I have a distinct disadvantage, we all know it, and that is I did not participate in the case itself." (*Id.*) Later Judge Nangle added, in lamenting his inability to assess the contingency risk, of any of Mr. Chesley's undertakings in this case, "I'd have to say this is a disadvantage I have; Spiegel would know better." RA677.[18]

Judge Nangle also lamented the absence of a real opponent to the application of the fee petitioning lawyers. By default, Judge Nangle had to look to Mr. Wolfman: "I am sure there's a lot of nuances about the settlement that need clarification. And particularly Mr. Wolfman, I don't want you to hesitate . . . . I don't need a lot of things, but I need a lot of information about other things." *Id.* at 10. In commenting on the lack of any objections or participation from Defendants that would be helpful to Judge Nangle in deciding the fee issue, he was constrained to say at the hearing about Defendants and their attorneys, "Mr. Goot and Mr. Hawkins or whatever, and Pfizer rolled over and played dead. So I needed some controversy and I needed an adversarial proceeding." *Id.* at 141. Later, with nobody except Mr. Wolfman having uttered any critical comment at all (but as noted above, his was a muted, incomplete and circumscribed

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[18] Appellants have asserted that this "disadvantage" was precisely the reason why an evidentiary hearing, using the tried and true, Federal Rules of Evidence, was indispensable to a fair and just result in the awarding of fees, and why also it trivialized the whole process for Appellants to be first ostracized and then banished from the fee setting proceedings.

criticism), Judge Nangle stated his gratitude for at least having had somebody there to give the court a counter-point, saying,

> "I feel I have benefitted from [Public Citizen's] presence here, because the defendants, you know, obviously it's the way it goes, were not opposing it. And I think that Mr. Wolfman and Public Citizen's people have given me a basis for consideration that I otherwise may not have had. I might have been deprived of some of it, and I would have to do a lot of digging." *Id.* at 130.

In the face of no real opposition to the fee applications (except for the urgings of Mr. Wolfman that a lodestar method be used and that the settlement was not quite the unflawed, half billion dollar, bonanza for the class that Mr. Chesley claimed it was), Judge Nangle had no reason to look into the issues of collusion, misrepresentation of services performed or whether Mr. Chesley performed any truly valuable services in causing the settlement.

REASONS FOR GRANTING THE WRIT

I. This Is A Case Of First Impression Concerning The Rights Of Class Members To Obtain The Participation In The Fee Setting Pross That Is Contemplated By Fed.R.Civ.P. 54(d)(2)(C), And It Is An Opportunity For The Supreme Court To Establish The Right Of Absent Class Members And Their Attorneys to Participate In Tryly Adversarial Hearings When Fees That Will Be Deducted From Class Settlements Are To Be Set, And To Determine If Counsel For Objectors Who Benefit The Class Have A Right To Share In Court Awarded Fees.

The instant case shows the mischief and abuse that could be expected when multi-million dollar fee awards are made not on the basis of an evidentiary record, but based on favoritism of a judge or a judge's reliance on untested representations and argument of lawyers. The Federal Rules were amended to include new section 54(d)(2)(C), but it appears that this section of the Rules is being ignored by the lower courts; it certainly was here.

While the courts have acknowledged generally the salutory nature of evidentiary hearings when there are disputed issues of fact in fee hearings, there still is the view that whether an adversarial hearing is required is wholly discretionary with the district court. But without better defined standards, the district courts can evade review by merely prohibiting the creation of a factual record in the first place, as was done here. This wide discretion therefore serves to undercut the important reasons why the class members should have a non-discretionary right to an adversarial hearing, as Rule 54(d)(2)(C) seems to grant them...at least as it is written and plainly interpreted.

That is not to say that the courts have not spoken of an adversarial, evidentiary hearing as a minimum requirement in certain situations. This Court endorsed the requirement for an evidentiary fee hearing, when facts are disputed in *Blum v. Stenson, et al.*, 465 U.S. 886, 892-893, n.5. (1984), where this Court cited with approval the holding in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2nd Cir. 1974) ("where facts are disputed, an evidentiary hearing is required before a district court determines a proper attorneys' fee award.") The Eleventh Circuit, in *In re Holywell Corporation v. Smith*, 967 F.2d 568 (11th Cir. 1992), embraced this position requiring district courts to conduct evidentiary hearings when material facts regarding the amount of services rendered are disputed. *Id.*, 967 F.2d at 571. The Eleventh Circuit reiterated its position in *Love v. Deal*, 5 F.3d 1406 (11th Cir. 1993), where the court held that an evidentiary hearing on attorneys' fees is always required where a dispute of material historical fact cannot be resolved from the record. *Id.*, 5 F.3d at 1409. The Fifth Circuit court in *In re Air Crash Disaster at Florida Everglades on December 29, 1992, et al.*, 549 F.2d 1006 (5th Cir. 1997), held that a district court must set and conduct a hearing in the full sense of the word and that the lawyer-competitors for the award of fees must offer relevant evidence and must be available for cross examination. *Id.*, 549 F.2d at 1021. See, also, *Cramer v. United States*, 47 F.3d 379, 383 (10th Cir. 1995); *Lindy Bros. Builders, Inc. of Philadelphia v. American R. & S. Sanitary Corp.*, 487 F.2d 161, 169 (3rd Cir. 1973) ("on motion for attorney fees, [t]he opposing interests should be afforded a hearing to provide an evidentiary basis for resolution of disputed factual matters and to allow the parties to supplement possibly incomplete statements of opposing parites."); *King v. McCord*, 621 F.2d 205, 206 (5th Cir. 1980) (abuse of discretion for district court not to hold evidentiary hearing to resolve disputed issues of

fact); *Marble v. Walker,* 704 F.2d 1219, 1222 (11th Cir. 1983) (same).

This Court can resolve the discrepancy between the bromides that seem to protect the class members (and competing lawyers) from unjustifiable results at fee setting proceedings, and what actually is allowed to occur (as in this case), by interpreting Rule 54(d)(2)(C) as not giving the district court discretion to avoid an adversarial and evidentiary hearing when one is requested.

Finally, as shown above, the Law Firm Appellants performed valuable services that benefitted the class, but were deprived the right to share in the fees. A lawyer who performs services in anticipation of fees, knowing that the fees are to be set by an officer of the government (a judge) has at least a Fifth Amendment right to present evidence and participate in a fair hearing. *See, In re Nineteen Appeals*, 982 F.2d 603, 613 (1st Cir. 1992). Unfortunately, although this issues arises frequently in class action litigation, with this Court not having addressed the issue, attorneys for objectors or absent class members who perform valuable services for the class are at the peril of district judges who might tend to favor the local attorney the court appointed to represent the class. Here, the Law Firm Appellants were treated as if they had no rights to due process whatsoever when it came to awarding fees.

II. Class Members Need A Clearly Defined Rule Concerning What They Must Do To Obtain Standing To Appeal A District Court's Erroneous Certification Of A Class Action Or Use Of Improper Procedures In Approving A Class Settlement

In the instant case Appellants objected in the district court that under Rule 23, it was improper for this settlement

class to be certified, and that the district court had used improper procedures in undertaking to review and evaluate, as Rule 23(e) requires, whether the settlement was fair and adequate. This Court's decision in *Amchem Products, Inc. v. Windsor*, ___ US ___, 1997 WL345149 (U.S.); No. 96-270 (6/25/97) proved that Appellants were correct in all aspects of their challenges. However, despite being on the right side of the legal issue, Appellants were deprived of all opportunity to have an appellate court review the errors of the district court.

The current trend of nationwide (and in this case global) class certifications cries out for a uniform rule concerning when an absent class member has standing to appeal. For example, Appellants' counsel practice in Philadelphia and were familiar with the Third Circuit's practice of affording class members standing to appeal the class certification and settlement approval decisions of a district court.[19]

The notice that Appellants received invited them to participate in the fairness hearing, to file objections and to have their counsel enter an appearance. It said nothing about requiring them to intervene if they wanted to obtain appellate review of mistakes the district court might make. Moreover, as discussed earlier, the Sixth Circuit's law seemed to be the

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[19] The Third Circuit has consistently held that non-named class members have a right to appeal any final order by the district court. *Carlough v. Amchem Products, Inc.*, 5 F.3d 707, 713 (3rd Cir. 1993); *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3rd Cir. 1971),("judges no longer have the full benefit of adversarial proceedings,") *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 1310 (3rd Cir. 1993). ("objectors play an important role by giving courts access to information on the settlement's merits" and fully realize the preeminent concern of all members of the class, that the settlement is fair and adequate to all members, even if "non-intervening objectors will render the representative litigation 'unwieldy'.")

same as that in the Third Circuit in that the only reported cases there allowed direct appeals by class members.[20]

Most class members are not represented by counsel when notice of a class settlement is received, and it is not unlikely that their own lawyer will be in a jurisdiction that is different than the forum where the settlement will be evaluated. Under today's state of the law in the various circuits, what is a lawyer and his class member client to do to assure that the class member's right to obtain review of the district court's procedure and decisions? Should he spend the large sums to hire a lawyer in a distant forum to intervene, before the class member even knows whether he will object to the proceedings or the outcome of the Rule 23(e) hearing? But wouldn't obliging absent class members to employ such a prophylactic measure contravene the very purposes of Rule 23, to say nothing of Rule 1?

Presently, there is a deep and confusing split amongst the circuits that cries out for resolution. Appellants here lost a motion to dismiss in the Sixth Circuit because they did not intervene, and later, they lost a second motion to dismiss in the Sixth Circuit even though they had filed an motion to intervene, years before their appeal was filed. What then is the rule in the Sixth Circuit?[21] A survey of recent decisions shows the lack of any well defined standard. The Ninth Circuit declares that, "with respect to treating class members as parties for certain procedural purposes, it is clear that class

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[20] In *Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1061 (6th Cir. 1994) the Sixth Circuit makes a very unconvincing effort to reconcile the rule it applied to dismiss Appellants' appeal with its prior published opinions to the contrary.

[21] According to *Shults v. Champion Int'l Corp.*, supra., a motion to intervene filed by a class member should be granted automatically...except in this case.

members and parties are treated in substantially the same manner in regard to the substantive benefits and burdens of judgment." *In re Cement Antitrust Lit.*, 688 F.2d 1297, 1309 (9th Cir. 1982). The only requirement for appeal is that the non-named class member be aggrieved or dissatisfied, thus meeting "Article III requirements and...recogni[zing]that not all class members will be aggrieved by all decisions." *In re First Capital Holdings Securities Lit.*, 33 F.3d 29, 30 (9th Cir. 1994); *see Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981).

When facing an appellant who was not a party but was bound by the judgment, the D.C. Circuit recognized that unnamed class members constitute an exception to the the general rule that a non-party has no standing to appeal. *United States v. LTV Corp.*, 746 F.2d 51, 53 (D.C. Cir. 1984). Similarly, the Fourth Circuit recognized an exception to the non-party rule when the appellant has an interest in the cause litigated and participated actively in the proceedings. *Kenny v. Quigg*, 820 F.2d 665, 668 (4th Cir. 1987). This is directly on point with the standing of unnamed class members to appeal. The First Circuit also recognizes the standing of aggrieved non-parties to appeal. *SEC v. An-Car Oil Co., Inc.*, 604 F.2d 114 (1st Cir. 1979). Even non-settling members could have standing to appeal so long as their appeal is timely and on the heels of objections to the settlement. *In re Viatron Computer Systems Corp. Lit.*, 614 F.2d 11, 14-15 (1st Cir. 1980).

Whereas the Seventh Circuit once fell squarely within the law of the Third and Ninth Circuit, it has recently made deciphering its current rule almost metaphysical. *Compare*, *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970) (mere objection at fairness hearing is sufficient to preserve right to appeal final settlment), *Armstrong v. Board of School Directors, Etc.*, 616 F. 2d 305 (7th Cir. 1980)(unnamed class member's "right to appeal exists independently

of any motion [to intervene] made in the district court."), and *Matter of VMS Ltd. Partnership Securities Lit.*, 976 F.2d 362 (7th Cir. 1992) with *Isby v. Bayh*, 75 F.3d 1191 (7th Cir. 1996) (refusing to resolve the jurisdictional issue of standing to appeal and, alternately, resolving on the merits of the appeal). Thus, aggrieved class members in the Seventh Circuit are faced with the uncertainty of relying on the Circuit's former rule or anticipating what the new rule will be when it is finally born.

Similarly, the Eighth Circuit has mirrored the uncertainty of the other circuits and left class members no definite road map to establish standing. Formerly, this Circuit denied to un-named class members all standing to appeal. *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992) (it is particularly appropriate to require intervention as a condition for appeal when a class member's challenge to the adequacy of a settlement is contrary to the view of all other class members"). More recently, the Eighth Circuit has made a somewhat suspect distinction for a member appealing an injunction "when it is adversely affected by an injunction." *In re Piper Funds, Inc.*, 71 F.3d 298, 301 (8th Cir. 1995).

As all Circuits on the far side of the split, the Eighth Circuit derived its former rule directly from the Eleventh Circuit. Concerned less with the rights of class members than with eliminating the complexities of complex litigation, the Eleventh Circuit treated direct appeals by un-named and aggrieved class objectors as usurping representation of the class. *Guthrie v. Evans*, 815 F.2d 626, 628 (11th Cir. 1987). Such objectors, the court reasoned, could intervene, launch collateral attack (thus postponing threats to efficacy), or simply opt-out of the settlement. *Id.*

In both the Eleventh and the Fifth Circuits, the practicability of these alternatives was never addressed, and an absolute prohibition on direct appeals without intervention

developed. *In re Southeast Banking Corp Securities Lit.*, 51 F. 3d 1003 (11th Cir 1995); *Matter of Placid Oil Co.*, 988 F.2d 554 (5th Cir. 1993); *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir. 1988).

Even the split in the Federal Courts is not clean. The Tenth Circuit, in an over-done attempt to line-up courts in accord with its own extreme view, actually suggested that the Third Circuit misunderstood its own precedent, and that, for undisclosed reasons, the Seventh Circuit will ultimately adopt the rule laid out by the Fifth Circuit. *Gottlieb v. Wiles*, 11 F.3d 1004, 1009-1011 (10th Cir. 1993). Just as un-named class members in the Fifth, Sixth, and Eleventh Circuits, in the Tenth Circuit such a member has no standing to appeal unless granted intervenor status. *Id.* However, the Tenth Circuit adds a caveat wherein a member aggrieved as the result of insufficeint notice may directly appeal such an affront to due process. *Id.* Subsequently, the Tenth Circuit began adding exceptions to its rule because representation may break down, notice may be insufficient or the opt-out feature could be ostensibly inoperable. Thus, a non-intervenor may directly appeal an award of fees. *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1442-3 (10th Cir. 1995). Otherwise, a non-intervenor is denied direct appeal.

Despite the efforts of some Circuits to explain away the split in the Federal Courts, the Second Circuit addressed the true state of the law. Unable to reconcile itself to either, antagonistic line of cases, this Circuit made a call for Supreme Court resolution of the division and denied appeal by tenatively holding on the merits. *New York v. Reebok Int'l Ltd.*, 96 F.3d 44 (2nd Cir. 1996).

Clearly a uniform rule is needed.

III. The Sixth Circuit's Failure To Comment On Judge Spiegel's Improper Actions Will Contribute To A Nationwide Loss Of Confidence In The Federal Courts

Judge Spiegel, based upon a conflict of interest, recused himself from deciding any issue relating to the reward of attorneys' fees in this case. A135-A140. Thereafter, he "re-entered" the case and awarded attorneys' fees to class counsel and denied any fees to the Law Firm Appellants. However, once Judge Spiegel recused himself from deciding any issue relating to attorneys' fees award in this case, he had no right to issue any orders on the attorneys' fee issue. *See, Stringer v. United States*, 233 F.2d 947, 948 (9th Cir.1956).

The Sixth Circuit, when presented with this record, did not even comment on Judge Spiegel's improprieties which resulted in an award of millions of dollars to class counsel. In light of the recent trend of court's approving multi-million dollar class action settlements and awarding multi-million dollar fees to attorneys, Judge Spiegel's impropriety should have been addressed by the Sixth Circuit. By allowing Judge Spiegel to misuse his judicial power, the Sixth Circuit's actions surely will shake the public's confidence in the federal court system. *See, El Fenix de Puerto Rico v. The M/Y Johanny, etc., et al.*, 36 F.3d 136, 142, n.7 (1st Cir.1994). The very purpose of the recusal statute, 28 U.S.C. 455(a), is to avoid the appearance of partiality and impropriety. *See, Liljeberg v. Health Services Corp.*, 486 U.S. 847, 860 (1988).

Foremost, Appellants had a constitutional right to an unbiased adjudication relating to the award of fees. *See, El Fenix de Puerto Rico v. The M/Y Johanny, etc., et al.*, 36 F.3d at 142, n.7. The Sixth Circuit did not even address the impropriety of Judge Spiegel in entering an order on an issue in which he recused himself because of a conflict of interest.

The implications of the Sixth Circuit's ignoring this issue has nationwide consequences on the integrity of the judiciary.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

/S/_____
Gary Green
(Counsel of Record)
Larry M. Keller
Sidkoff, Pincus & Green
2700 ARAMark Tower
1101 Market Street
Philadelphia, PA 19107
(215) 574-0600

Morton B. Wapner
Wapner, Newman & Wigrizer
115 South 21st Street
Philadelphia, PA 19103
(215) 569-0900

Counsel for Petitioners

Date: June 28, 1997

APPENDIX A

Nos. 94-4322; 95-4054; 96-3568/3740/3744/3774

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
DECEMBER 16, 1996
LEONARD GREEN, CLERK

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Arthur Ray Bowling, et al., *Plaintiffs-Appellees*,	)	
Jeffrey A. Crane, Gene Randall, Gerard Benedik, *Intervenors-Appellants (96-3568)/ Cross-Appellees*,	)	
Stanley M. Chesley, Waite, Schneider, Bayless & Chesley Co., L.P.A., John T. Johnson, Johnson & Dylewski, James T. Capretz, Capretz & Radcliffe, Brian R. Magana, Magana, Cathcart & McCarthy, Charles M. Wolfson, *Cross-Appellants (96-3744)/ Appellees*,	)	**ORDER**

Sidkoff, Pincus & Green, P.C.,)
Wapner, Newman & Wigrizer,)
Appellants (95-4054; 96-3774)/)
Cross-Appellants (96-3740)/)
Appellees,)
)
Elizabeth W. Ridgeway, et al.)
On behalf of themselves and as)
representatives on behalf of the)
Pennsylvania Class Objectors,)
Appellants (94-4322; 95-4054)/)
Cross-Appellees,)
)
v.)
)
Pfizer, Inc., Shiley, Inc.,)
Defendants-Appellees.)

BEFORE: MARTIN, Chief Judge, Krupansky, Daughtrey, Circuit Judges.

In Order to ensure all appeals in the above-styled cases are resolved, it is hereby ordered that all judgments of the district court are affirmed. All motions pending before this Court are hereby denied.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

/S/_____
LEONARD GREEN, Clerk

APPENDIX B

Nos. 94-4322; 95-4054; 96-3568/3740/3744/3774

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
February 28, 1997
LEONARD GREEN, CLERK

ARTHUR RAY BOWLING, ET. AL., *Plaintiffs-Appellees*,	)	
JEFFREY A. CRANE, ET AL, *Intervenors-Appellants (96-3568)/ Cross-Appellees*,	)	
STANLEY M. CHESLEY, ET AL., *Cross-Appellants (96-3744)/ Appellees*,	)	**ORDER**
SIDKOFF, PINCUS & GREEN, P.C., ET AL., *Appellants (95-4054; 96-3774)/ Cross-Appellants (96-3740)/ Appellees*,	)	

ELIZABETH W. RIDGEWAY, ET AL.,
Appellants (94-4322; 95-4054)/ Cross-Appellees,

v.

PFIZER, INC., ET AL.,
Defendants-Appellees.

BEFORE: MARTIN, Chief Judge, KRUPANSKY and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the **petition is denied**.

ENTERED BY ORDER OF THE COURT

/S/_____
LEONARD GREEN, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
September 5, 1995
KENNETH MURPHY, CLERK

ARTHUR RAY BOWLING, et al., *Plaintiffs*,	)	
v.	)	**Case No. C-1-91-256**
PFIZER, INC., et al., *Defendants*.	)	

ORDER ON MOTIONS BY GREEN, et al., WAPNER, et al., AND PENNSYLVANIA CLASS OBJECTORS

Before the Court are a number of motions by Sidkoff, Pincus & Green, P.C., and Wapner, Newman and Wigrizer on their own behalf and on behalf of certain members of the settlement class known as the "Pennsylvania Class Objectors." After considering the order of the Honorable S. Arthur Spiegel entered herein on September 1, 1995, and the

applicable facts and law,

IT IS HEREBY ORDERED that the following motions are denied:

Motion Under Rule 59(e) by Counsel for Pennsylvania Class Objectors (Green, et al. And Wapner, et al.) And PA Class Objectors For Right to Participate in the Hearing on the Applications of Messrs. Chesley and Wolfman;

Motion by Counsel for Pennsylvania Class Objectors (Green, et al. And Wapner, et al.) and Pennsylvania Class Objectors For Discovery and an Evidentiary Hearing;

Motion to Strike Class Counsel's and Special Counsels' Memorandum in Opposition to the Requested Award of Fees and Expenses to Sidkoff, Pincus & Green, P.C. and Wapner, Newman and Wigrizer;

Request Under Fed.R.Civ.Pro. 54 (d)(2)(C) by the Pennsylvania Class Objectors (As Class Members) For Adversary Submissions and Objections.

/S/_____
John F. Nangle
United States District Judge

Dated: September 5, 1995

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
September 5, 1995
KENNETH MURPHY, CLERK

ARTHUR RAY BOWLING, et al., *Plaintiffs*,	)	
v.	)	**Case No. C-1-91-256**
PFIZER, INC., et al., *Defendants*.	)	

AMENDED ORDER SETTING HEARINGS ON APPLICATIONS FOR ATTORNEY'S FEES AND COSTS

By Order entered August 11, 1995 (doc. 616), this Court set hearings on certain applications for attorney's fees and costs currently before the Court in the above-captioned matter. Since entry of this Order, the Honorable S. Arthur Spiegel, United States Senior District Judge for the Southern District of Ohio, entered a supplemental Order of Transfer,

dated September 1, 1995, directing that the undersigned determine the amount and source of attorneys' fees and costs to be awarded in this case. The Order also contained a number of findings with respect to the financial benefit of certain attorneys' activities. Specifically, the Court concluded that class counsel, Stanley M. Chesley, Esq., and special counsel for the class: John T. Johnson, Esq., Brian Magana, Esq., Louis Saul, Esq., and Charles Wolfson, Esq., had rendered valuable services to the plaintiff class and that their applications should, therefore, be considered. The Court also concluded that the applications for attorneys' fees of Brian Wolfman, Esq., and Thomas Herren, Esq., should be considered because they, too, had rendered valuable services to the plaintiff class. The Court further found that the activities of counsel for the Pennsylvania class objectors, Sidkoff, Pincus & Green, P.C., and Wapner, Newman & Wigrizer, conferred no financial benefit upon the class and that, as a result, their application for attorneys' fees and costs should be denied. Finally, the Court reserved for the undersigned the question of whether the activities of Michael Zehender, Esq., the Consumentenbond, and possibly others, have benefitted the plaintiff class. Accordingly,

IT IS HEREBY ORDERED that the Order Setting Hearings On Applications For Attorney's Fees (doc. 616), entered August 11, 1995, be and is rescinded.

IT IS FURTHER ORDERED that a hearing to consider the fee applications of only those attorneys whose services the Honorable S. Arthur Spiegel has found to have benefitted the plaintiff class, as well as the applications of those for which a finding of benefit has not yet been made, shall be held on September 14, 1995, commencing at 10:00 a.m., in the Potter Stewart U.S. Courthouse Building, 100 East Fifth Street, Cincinnati, Ohio 45202.

IT IS FURTHER ORDERED that only a representative of those attorneys whose applications will be

considered, as well as a representative of defendants, shall participate as attorneys in said hearing.

IT IS FURTHER ORDERED that any participant in the above hearing who wishes to file objections or other documents shall file same, along with supporting memoranda, with the Court not later than September 8, 1995.

IT IS FURTHER ORDERED that, in the event that any interested party wishes to file exhibits in support of its position, the parties shall meet, in person or by telephone, for so long as is necessary to produce an agreed upon and unobjected to list of exhibits (or, where not agreed upon, stating in a few words the reasons therefor). A final copy of said agreed upon list shall be filed no later than September 8, 1995.

IT IS FURTHER ORDERED that, in order to minimize the need to hear unnecessary and repetitive evidence at aforesaid hearing, all attorneys participating in the hearing shall meet, in person or by telephone, forthwith and for as long as is necessary for the purpose of creating a comprehensive stipulation covering all matters which can reasonably be stipulated to. The time spent preparing said stipulation shall not be chargeable against the common funds in this case.

IT IS FURTHER ORDERED that any material fact to which a party cannot stipulate shall be separately listed along with a succinct statement of the reasons for the party's inability to stipulate. In order to assure that the number of material facts in dispute is reduced to an irreducible minimum, any party refusing to stipulate to a fact found to be without justification will be subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the parties' comprehensive stipulation shall be filed with the Court not later than September 11, 1995.

IT IS FURTHER ORDERED that a copy of all

documents filed in compliance with this Order shall be received, by courier or facsimile, at the following address not later than September 11, 1995:

The Honorable John F. Nangle
125 Bull Street, Room 100
P.O. Box 8287
Savannah, GA 31412
FAX: (912) 652-4070

/S/_____
John F. Nangle
United States District Judge

Dated: September 5, 1995

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
September 1, 1995
KENNETH MURPHY, CLERK

ARTHUR RAY BOWLING, et al., *Plaintiffs*,	)	
	)	**Case No. C-1-91-256**
v.	)	
	)	**ORDER**
PFIZER, INC., et al., *Defendants*.	)	

This case was transferred from the docket of the Honorable S. Arthur Spiegel to the docket of the Honorable John S. Nangle, United States Senior District Judge for the Eastern District of Missouri sitting by designation in the United States District Court for the Southern District of Ohio, on the issue of the award of attorneys' fees and costs only (doc. 612). Subsequent to the transfer, motions have been filed by counsel which have created some questions for Judge Nangle in fulfilling his role. This supplement to the Order of Transfer is to clarify this situation.

First, Judge Nangle will determine the amount of attorneys' fees and costs to be awarded. Judge Nangle will also determine which settlement fund or funds shall make these payments.

Second, this Court concludes that the attorneys' fees of class counsel, Stanley M. Chesley, Esq. and those of special counsel for the class: John T. Johnson, Esq., Brian Magana, Esq., Louis Saul, Esq., and Charles Wolfson, Esq., having rendered valuable services to the plaintiff class should be considered. This award should be in one sum, the division of which shall be accomplished by the aforesaid counsel and not by the Court.

Third, this Court concludes that Brian Wolfman, Esq., James T. Capretz, Esq., and Thomas Herren, Esq.'s applications for attorneys' fees, should also be considered, said attorneys having rendered valuable services to the plaintiff class.

Fourth, it is the conclusion of the Court that the applications of counsel for the Pennsylvania class objectors, Messrs. Sidkoff, Pincus & Green, P.C. and Wapner, Newman & Wigrizer for awards of fees and costs should be denied. These attorneys did not contribute any financial benefit to the plaintiff class in their activities in this litigation.

Fifth, with regard to applications for attorneys' fees and costs filed by others, not covered by the foregoing, Judge Nangle shall consider whether the applicants have provided a benefit to the plaintiff class, and, if so, shall grant the application and make an appropriate award of fees and costs. Such applications would include, but not be limited to, that of Michael Zehender for attorneys' fees (doc. 583), and the application for award of costs of the Consumentenbond (doc. 639).

SO ORDERED.

Dated: September 1, 1995

/S/_____
S. Arthur Spiegel
United States Senior
District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
August 14, 1995
KENNETH J. MURPHY, CLERK

ARTHUR RAY BOWLING, et al., *Plaintiffs*,	)	
	)	**Case No.**
v.	)	**C-1-91-256**
PFIZER, INC., et al., *Defendants.*	)	

ORDER SETTING HEARINGS ON APPLICATIONS FOR ATTORNEY'S FEES

Before the Court are the applications for attorney's fees and reimbursement of costs and expenses of Stanley Chesley, class counsel in this case; Brian Wolfman of Public Citizens Litigation Group; and Gary Green. Accordingly,

IT IS HEREBY ORDERED THAT a hearing on Messrs. Chesley's and Wolfman's applications shall be held on September 14, 1995, from 9:30 a.m. until, and no later

than 11:30 a.m., in the Federal Courthouse located in the Southern District of Ohio, Western Division, Cincinnati, Ohio.

IT IS FURTHER ORDERED THAT only Messrs. Chesley, Wolfman, and a representative of defendants, shall participate as attorneys in said hearing.

IT IS FURTHER ORDERED THAT a hearing on Mr. Green's application shall be held on September 14, 1995, from 11:30 a.m., or as soon thereafter as same may be heard, until, and no later than 1:00 p.m., in the Federal Courthouse located in the Southern District of Ohio, Western Division, Cincinnati, Ohio.

IT IS FURTHER ORDERED THAT only Messrs. Chesley, Wolfman, and Green, or their representative, as well as a representative of defendants, shall participate as attorneys in said hearing on Mr. Green's application.

IT IS FURTHER ORDERED THAT in each of the above hearings, any participant wishing to file additional material or to object to an application shall file same, along with supporting memoranda, with the Court not later than August 31, 1995.

IT IS FURTHER ORDERED THAT, in the event that any interested party wishes to file exhibits in support of its position, the parties shall meet in person or by telephone for so long as is necessary to produce an agreed upon and unobjected to list of exhibits. A final copy of said agreed upon list shall be filed no later than September 7, 1995.

IT IS FURTHER ORDERED THAT any party filing an application, brief, motion, or other paper pursuant to this Order shall also immediately forward a copy of same to the following address:

The Honorable John F. Nangle
125 Bull Street, Room 100
P.O. Box 8287
Savannah, GA 31412

/S/_____
John F. Nangle
United States District Judge

Dated: August 11, 1995

APPENDIX G

Case Nos. 94-4322, 95-4054, 96-3568, 96-3740, 96-3744 and 96-3774

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
DEC 26, 1996
LEONARD GREEN, CLERK

ARTHUR RAY BOWLING, et al.,
Plaintiffs-Appellees,

STANLEY M. CHESLEY, et al.,
Appellees/Cross-Appellants,

SIDKOFF, PINCUS & GREEN, P.C., et al.,
Appellants/Cross-Appellees,

ELIZABETH W. RIDGEWAY, et al.,
Objectors,

JEFFREY A. CRANE; GENE RANDALL; GERARD BENEDIK,
Intervenors-Appellants/Cross-Appellees,

v.

PFIZER, INC.; SHILEY, INC.,
Defendants-Appellees.

On Appeal from Final Orders of the District Court for the Southern District of Ohio Entered on November 25, 1994, August 14, 1995, September 1, 1995, September 5, 1995, March 1, 1996, March 12, 1996 and May 28, 1996

APPELLANTS' PETITION FOR REHEARING EN BANC

Gary Green
Larry M. Keller
SIDKOFF, PINCUS & GREEN, P.C.
2700 ARAMark Tower
1101 Market Street
Philadelphia, PA 19107
(215) 574-0600

Morton B. Wapner
WAPNER, NEWMAN & WIGRIZER
115 South 21st Street
Philadelphia, PA 19103-4433
(215) 569-0900

Attorneys for Appellants-
Cross-Appellees

Elizabeth W. Ridgeway, et al.,
Sidkoff, Pincus & Green, P.C.
and
Wapner, Newman & Wigrizer

Case Nos. 94-4322, 95-4054, 96-3568, 96-3740, 96-3744 and 96-3774

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al.,
Plaintiffs-Appellees,

STANLEY M. CHESLEY, et al.,
Appellees/Cross-Appellants,

SIDKOFF, PINCUS & GREEN, P.C., et al.,
Appellants/Cross-Appellees,

ELIZABETH W. RIDGEWAY, et al.,
Objectors,

JEFFREY A. CRANE; GENE RANDALL; GERARD BENEDIK,
Intervenors-Appellants/Cross-Appellees,

v.

PFIZER, INC.; SHILEY, INC.,
Defendants-Appellees.

APPELLANTS' PETITION FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the United States Court of Appeals for the Sixth Circuit and the Supreme Court of the United

States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions:

Blum v. Stenson, et al., 465 U.S. 886 (1984); *Building Service Local 47 Cleaning Contractors Pension Plan et al. v. Grandview Raceway, et al.*, 46 F.3d 1392 (6th Cir. 1995); *Jordan, et al. v. Mark VI Hair Styles, Inc., et al.*, 806 F.2d 695 (6th Cir. 1986); *Shults, et al., v. Champion International Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Sales v. Marshall*, 873 F.2d 115 (6th Cir. 1989); *B.F. Goodrich Company v. Rubber Latex Products, Inc.*, 400 F.2d 401 (6th Cir., 1968); *Bailey v. Hecker*, 177 F.3d 1167 (6th Cir. 1985); *Steckle v. Lurie*, 185 F.2d (6th Cir. 1950).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether in the Sixth Circuit, as appears from the Panel's disposition of Appellants' Appeal, the rule really is that members of a class action shall be deprived of all of the rights guaranteed and *mandated* unequivocally by Fed.R.Civ.P. 54(d)(2)(C), including, *inter alia*, to be afforded an afforded an opportunity for adversary submissions under Rule 43(e) or Rule 78 with respect to applications for attorneys' fees (even where, as here, the fees were deducted from the class' settlement funds, and thus diminished the amount that was distributed to the class members): and rather, in contravention of Fed.R.Civ.P. 54(d)(2)(C)'s *mandate*, class members who invoke explicitly Fed.R.Civ.P. 54(d)(2)(C), may be excluded nonetheless from any and all participation in the attorneys' fees setting proceedings on order entered by the district court, *sui sponte*, with no cause for deviating from the rule's requirements having been found, or request for such a deviation having been made by any

party?

2. Whether in the Sixth Circuit, as appears from the Panel's disposition of Appellants' Appeal, the rule really is (*contrary* to the recent holding of this Court that, for purposes of establishing ***appellate*** *standing*, there is a presumption an unnamed class member's motion to intervene should be granted by the district court,[1] *Shults, et al. v. Champion International Corporation*, 35 F.3d 1056 (6th Cir. 1994)), a motion to intervene filed by class members for purposes of participating in post-fairness hearing proceedings (including the award of attorneys' fees and the implementation of the settlement, as well as in aid of their appeals and other legitimate purposes) may be summarily denied by a district court on the usurpingly improper and frivolous grounds that the district court specifically wanted to hinder these class members from filing "appeals aimed at overturning [the district] court's approval of the settlement" [See, *Bowling v. Pfizer*, 159 F.R.D. 492, 495 (S.D. Ohio 1994]; even though, at the same time, the district court

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[1] The motion to intervene is needed for appellate standing, not for purposes of establishing standing to participate in the district court's fairness hearing. Under Fed.R.Civ.P. 23(c)(2), and in practice, when a Rule 23(b)(3) class action is certified and settled simultaneously (as here), the terms of the notice sent by the court to the class members invites each of them to participate, and to have their counsel participate in the district court's fairness hearing proceedings. As noted in *Shults, et al. v. Champion International Corporation*, 35 F.3d 1056 (6th Cir. 1994), the controversial issue is whether, regardless of having so participated at the district court level, an objecting class member must have filed also a formal motion to intervene to have appellate standing to challenge later, in the Court of Appeals, the orders certifying the class and approving the settlement.

granted the motion to intervene filed on behalf of other class members whom the court did not think would challenge its rulings on appeal [*Id.* 159 F.R.D. at 499]?

3. Whether in the Sixth Circuit, as appears from the Panel's disposition of Appellants' Appeal, the rule really is that, *contrary* to the decisions of the Supreme Court and earlier published opinions of this Court holding that there must be an evidentiary hearing on disputed issues of fact on applications for attorneys' fees, [*See, Blum v. Stenson*, 465 U.S. 886 (1984); *Building Service Local 47 Cleaning Contractors Pension Plan et al. v. Grandview Raceway, et al.*, 46 F.3d 1392 (6th Cir. 1995); *Jordan, et al. v. Mark VI Hair Styles, Inc., et al.*, 806 F.2d 695, 697 (6th Cir. 1986)], *and* despite the undeniable presence on the record of legitimately disputed material issues of fact (including, *inter alia*, whether the settlement and enhancements that benefitted the class were produced by the efforts of out-of-state attorneys, and not solely by a local, fee-petitioning attorney that the district court judge favors), the district court judge has this Court's *permission* to actively prevent the formation of *any factual record*, and to eschew all of the Federal Rules of Evidence for the purpose of *paving the way* for an award of millions of dollars in counsel fees to the local attorney he favors, while at the same time, arbitrarily and summarily concluding, as a matter of law, that *no* fees are to be awarded to the out-of-state attorneys he does not favor; and in addition, based on the Panel's decision in this case, has this Court also *exempted* the district court from abiding by the Sixth Circuit's clear precedent that a conclusion of law (i.e., the district court's denial of fees to the disfavored, out-of-state attorneys) must be supported by findings of fact. [*See, B.F. Goodrich Company v. Rubber Latex Products, Inc.*, 400 F.2d 401, 402 (6th Cir. 1968); *Bailey v. Hecker*, 777 F.2d 1167 (6th Cir. 1985)]?

4. Whether a district court judge, whose authority to decide attorney fees was removed from him by Order of the Chief Justice of the Supreme Court due to conflict of interest, could nonetheless insert himself back into the case, on his own initiative and authority, two months later, to enter a naked, unfounded and arbitrary Order that summarily denied fees to out-of-state attorneys while at the same time, awarded fees to his favored, local attorney whom he had appointed as class counsel, where:

(a) Chief Justice Rhenquist designated visiting, Senior Judge Nangle to decide the fees in the *Bowling* case, as a replacement for Judge Spiegel because class counsel's wife had been appointed to serve as a judge on the same District Court of Ohio as Judge Spiegel sat, thus creating a conflict for Judge Spiegel;

(b) Based on Chief Justice Rhenquist's Order and the circumstances, Chief Judge Martin constrained to state from the bench at oral argument on November 19, 1996, that Judge Spiegel *had a conflict of interest*, and that Judge Spiegel should not have presided over any further matter in *Bowling* after Judge Nangle had been appointed to the case by Chief Justice Rhenquist;

© Under the Sixth Circuit's holding in *Steckle v. Lurie*, 185 F.2d 921 (6th Cir. 1950), Judge Spiegel had no jurisdiction or authority to enter any further orders in Bowling after Judge Nangle took over.

4. In writing its *published opinion* in this case, did the Panel overlook *mistakenly* each and every substantive issue, presumably-binding case citation and claim that these Appellants had briefed and argued (in two separate sessions of oral argument); or is it the policy of the Sixth Circuit, and its view of the due process it owes to litigants properly before it to use the device of simply *sweeping under the rug* all of the hard and challenging points, and to then ignore every issue raised, omit in its *published opinion* any mention or

recognition of even one of the substantive arguments or points Appellants asserted, and to craft the impression that none of the challenging issues had even been before it for decision?

/S/_____
Gary Green
Attorney of Record for
Appellants

A. By Inadvertence or Other Error, the Panel Failed to Address Any Issue Raised by the PCO Appellants and its Order Contradicts Prior Supreme Court and Sixth Circuit Authority

Case Nos. 94-4322 and 95-4054 are two separate appeals of the Pennsylvania Class Objectors and their fee-petitioning counsel (known collectively as "PCO" or "Appellants"). Case No. 94-4322 in an appeal of the district court's denial of a motion to intervene filed by class members who sought to participating in post-fairness hearing proceedings and to have standing to appeal ("Intervention Appeal"); Case No. 95-4054 is an appeal of a set of conclusory orders (based on no factual record whatsoever) that denied the PCO attorneys the right to participate in the fee hearing proceedings and to recover attorneys' fees for the *acknowledged* benefits their work had bestowed upon the class in the creation and enhancement of the class settlement ("Attorneys' Fees Appeal"). These two Appeals were consolidated for oral argument by the Panel with a separate appeal that had been filed by Mr. Chesley, class counsel, who thought his award was too low; and with the appeal of other class members ("Crane") who wanted discovery relating to the fee issue.

When the Panel issued its published Opinion on December 12, 1996 ("Opinion"), it discussed at length, each of the issues raised in Mr. Chesley's appeal, as well as each of the issues raised by the Crane appeal. By contrast, *not one issue or argument raised in the PCO's appeals was recognized, mentioned or discussed in the Panel's Opinion.* It was as if the PCO had never existed, had never presented issues for the Court to resolve, and that the Panel could make the serious issues raised by the PCO go away by simply ignoring the PCO. Following inquiries by counsel for

various parties (who, on reading the Opinion, were mystified about what had happened to the PCO's appeals) the PCO's appeals were disposed of by a vaguely worded Order, issued on December 16, 1996, that likewise did not address or acknowledge the substance of any issue the PCO had raised. In short, the Panel's Opinion and Order either by mistake or design, leaves the impression that the PCO had not raised any of the serious issues found in its briefs and asserted during two separate sessions of oral argument. It thus appears that for this Panel, the PCO might as well have written their briefs in invisible ink.[2]

The three lawyers representing the PCO in this case collectively have about 75 years of experience practicing trial and appellate law in different courts around the country. To them and to their colleagues (in this case) and at the Bar in general, what happened to the PCO's appeals was astounding, unprecedented and in defiance of the tenets of due process, to say nothing of the practice lawyers have found to be customarily followed by Circuit Courts of Appeals. As noted above, the result may be the product of confusion and an oversight by the Panel. One indication is that at oral argument, the Panel forced the two main antagonists, the PCO and Mr. Chesley to split 15 minutes (as if they were on the same side) while giving a full 15 minutes to Crane who had only a peripheral, discovery issue. Also, the Panel lost sight at oral argument of the distinctions between the separate appeals: (1) The denial of the PCO's fees arbitrarily and/or for illicit reasons; (2) The refusal of the district court to allow the creation of a factual record on disputed issues of fact that arose during the fee splitting agreements that Mr. Chesley had with lawyers who originally represented objectors to the class

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[2] The Opinion and Order are attached as Exhibits "A" and "B".

settlement but who dropped their objections in exchange for a portion of his fee; and (5) the wholly unrelated issue of the denial of the PCO's motion to intervene as class members who wanted to participate in post settlement proceedings and perfect standing for appeal.

Perhaps the Panel was merely confused about these distinctions and the separate issues raised by the PCO were overlooked. In that event, reargument and reconsideration could correct the error. On the other hand, the fact that the PCO presented a record that showed possible impropriety by Judge Spiegel and fraud by Mr. Chesley could have presented issues the Panel just elected to not deal with, regardless of the merit of the PCO's position from a legal perspective. As will be summarized below, the Panel had before it legitimate issues and binding precedent that supported the PCO's position. The reasons why the Panel ignored the PCO is less important than whether that situation will now be cured.

1. Appellants properly raised the issue of Fed.R.Civ.P. 54(d)(2)(C):

> "With multi-millions of dollars about to be deducted from settlement funds available to class members as awarded, did the district court err in denying Law Firm Appellants' written request for adversary submissions under Fed.R.Civ.P. 54(d)(2)(C), despite a record replete with disrupted issues of fact concerning the adequacy of Class Counsel's representation; the nature, extent and effect of Class Counsel's services and the services of the Law Firm Appellants, and the court's prior and constant rulings that precluded adducing evidence on the issues pertinent to the awarding of fees?"

The granting of the PCO's motion under Fed.R.Civ.P. 54(d)(2)(C) seeking adversary submissions on the attorneys' fees application should have been mandatory and no discretion was allowed. *See*, 10 Wright and Kane, Federal Practice and Procedure; Civil 2d §2679. Although the district court denied the PCO's motion summarily, the Panel ignored this issue.

2. Appellants had properly raised the Intervention issue:

> "Where Appellants, non-named class members who participated in and objected at a fairness hearing concerning the certification and settlement of a tort-based Rule 23(b)(3) class action filed a motion to intervene in aid of their appeal of the lower court's order certifying the class and approving the class settlement, and thereafter, while the motion to intervene was still pending, Appellants filed a Rule 60(b) motion raising new grounds (including, fraud on the court and collusion committed by the proponents of the settlement) for why the court should not have approved the settlement and class certification, and where after the court denied the motion to intervene, Appellants filed timely for purposes of having standing to participate in post-settlement-approval proceedings (such as the award of Attorneys' Fees and the implementation of the settlement's terms), did the district court, which treated Appellants as parties during the fairness hearing, err when it denied the motions to intervene and the Rule 59(e) motion?"

Contrary to the Sixth Circuit's authority, the Panel's ruling has held the negative of this issue or, in the alternative, the Panel neglected to consider the issue at all. This ruling contradicts *Shults, et al. v. Champion International Corporation*, 35 F.3d 1056 (6th Cir. 1994), in which this Court held that there is a *presumption* that unnamed class members' motion to intervene *in the district court* should be granted.[3] Here, the only reason the district court gave for denying Appellants' Motion to Intervene was that granting intervention would not have allowed the Appellants to appeal approval of the class action settlement. Moreover, Crane (another class member) had been allowed to intervene by the district court, while at the same time, the PCO was denied intervenor status, and such constituted an abuse of discretion by the district court.[4] Moreover, the Opinion and Order are in conflict also with the Sixth Circuit's rulings in *Smartt v. Coca-Cola Bottling Corporation*, 337 F.2d 950 (6th Cir. 1964) and *Sales v. Marshall*, 873 F.2d 115 (6th Cir. 1984), which recognized the doctrine of *de facto* intervention, as the PCO had been treated by the district court as parties in this case.

3. Appellants had properly raised the issues in the Attorneys' Fees Appeal:

"Did the district court err when despite its

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[3] Prior to *Shults*, there had no reported decision of this Court requiring unnamed class members to intervene in the lower court to obtain standing to appeal approval of a class action settlement.

[4] The PCO had filed their original Motion to Intervene two years *before* Crane filed his motion.

refusal to allow the creation of a factual record, ruled before any hearing was held, that the Law Firm Appellants were not to share in the award of counsel fees from a common class fund they helped create and enhance, and where their objections at the Fairness Hearing greatly benefitted the class?"

Contrary to Sixth Circuit's authority, The Panel's ruling has held the negative of this issue or, in the alternative, the Panel neglected to consider the issue at all. This ruling defies the requirement of the Supreme Court and this Court, that there be an evidentiary hearing on disputed issues of fact on application for Attorneys' Fees. *See*, *Blum v. Stenson*, 465 U.S. 886 (1984); *Building Service Local 47 Cleaning contractors Pension Plan et al. v. Grandview Raceway, et al.*, 46 F.3d 1392 (6th Cir. 1995); *Jordan, et al. v. Mark VI Hair Styles, Inc., et al.*, 806 F.2d 695, 697 (6th Cir. 1986). Appellants' brief is replete with instances of disputed issues of fact relating to the applications for attorneys' fees which mandated a hearing in the district court on the applications for attorneys fees. Furthermore, Sixth Circuit law requires that Judge Spiegel's naked conclusion of law denying fees to the PCO Attorneys be supported by findings of fact. *See*, *B.F. Goodrich Company v. Rubber Latex Products, Inc.*, 400 F.2d 401, 402 (6th Cir. 1968); *Bailey v. Hecker*, 777 F.2d 1167 (6th Cir. 1985).

4. Appellants had properly raised the issues in the Attorneys' Fees Appeal:

   "Where for the purpose of hearing and determining the competing fee applications of the lawyers who had filed them, this settled class action had been transferred from the

docket of the originally-assigned trial judge who had conducted also the Fairness Hearing, to the docket of a visiting, senior district court judge, designated for that purpose through orders and actions of this Court of Appeals and the Chief Justice, did that original trial judge err when, without authority from this Circuit Court, or a request from the specially designated senior judge, he re-introduced himself, *sua sponte*, into the fee-setting process for the sole purpose of entering a totally unwarranted, punitive Order, without a hearing or otherwise adducing any facts, denying a fee to the Law Firm Appellants, and denying as well their various motions seeking to have an evidentiary record made on disputed issues of fact in the fee setting proceedings?"

and,

"Whether the district court judge erred, in taking back a case which had been transferred to a senior district court judge sitting by designation by the Chief Justice of the United States, on the issue of determination of and costs."

The Opinion and Order contradict the Panel's own comments at oral argument. The PCO had challenged the authority of Judge Spiegel to issue a ruling on September 1, 1995, which held that the PCO were not entitled to Attorneys' Fees in *Bowling*, since, on July 9, 1995, the Chief Justice of the Supreme Court, William H. Rhenquist, appointed Judge John F. Nangle to hear the *Bowling* case. Judge Spiegel had removed himself from the *Bowling* case because of a conflict

of interest since Class Counsel's wife[5] was being considered for a judgeship on the District Court of Ohio at the same time Judge Spiegel was to have awarded the Attorneys' Fees in *Bowling* [6]. Judge Spiegel's obvious conflict was recognized by Chief Judge Martin, who at oral argument on November 19, 1996, stated that Judge Spiegel *had* a conflict of interest because of Class Counsel's wife's consideration for a judgeship in the court where Judge Spiegel was sitting and that he should not have even been presiding over the *Bowling* case on any issue after Judge Nangle was appointed to the case. Despite this obvious conflict and his removal from the case, Judge Spiegel, who was not to be involved in the issue of attorneys' fees, took command of the case back for the sole purpose of entering an Order on September 1, 1995 to denying PCO's attorneys' fees. The PCO had raised that identical issue in the Attorneys' Fees Appeal and, although Judge Martin agreed with the PCO on the issue, the Opinion and Order do not mention or discuss the issue of Judge Spiegel's entering an order denying fees to the PCO's attorneys at a time when another Judge had been assigned to the case. This is contrary to the Sixth Circuit holding in *Steckle v. Lurie*, 185 F.2d 921 (6th Cir. 1950). In light of Judge Martin's statements at oral argument on November 19, 1996, it is odd, indeed that the issues raised by the PCO were not addressed in the Opinion or the Order. The Panel thus gave its sanction and approval to a district court judge who, without any jurisdiction, entered an Order denying Appellants

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[5] Class Counsel's wife was subsequently appointed to the District Court of Ohio.

[6] Judge Spiegel signed an Order on July 27, 1995 wherein he transferred the Bowling case to the docket of Judge Nangle.

attorneys' fees. In so doing, the panel ignored that Judge Spiegel had violated 28 U.S.C. §455, which mandated that he disqualify himself in a case where he had personal bias or prejudice concerning a party, in this case being class counsel, Stanley Chesley, Esquire.

There are other oddities and infirmities in the Panel's ruling. The Opinion is designated for publication under Sixth Circuit Local Rule 24. However, Rule 24(a)(vi) states that an Opinion should be published if it addresses a lower court's opinion, however, since the Opinion did not address any of the issues raised by Appellants, the designation of the Opinion for publication is a violation of Sixth Circuit Rule 24.

The PCO and their attorneys have been denied due process of law since *none* of the issues raised in their Appeals were addressed in the Opinion or the Order. The Court's dismissal of these appeals constitutes a gross abuse of power by this Court.

B. Conclusion

Based Upon the Arguments set forth above, Appellants respectfully request that their Petition for Rehearing En Banc be granted.

Respectfully submitted,

/S/_____
Gary Green
Larry M. Keller

Morton B. Wapner

Attorneys for Appellants/Cross Appellees

OF COUNSEL:
SIDKOFF PINCUS & GREEN, P.C.
2700 ARAMARK Tower
1101 Market Street
Philadelphia, PA 19107
(215) 574-0600

WAPNER NEWMAN & WIGRIZER
115 South 21st Street
Philadelphia, PA 19103-4433
(215) 569-0900

DATED: December 24, 1996

EXHIBIT A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION:
1996 FED App. 0384P (6th Cir.)
File Name: 96a0384p.06

Nos. 94-4322; 95-4054; 96-3568/3740/3744/3774

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Arthur Ray Bowling, et al., *Plaintiffs-Appellees*,	)	
Jeffrey A. Crane, Gene Randall, Gerard Benedik, *Intervenors-Appellants (96-3568)/ Cross-Appellees*,	)	**On Appeal from the United States District Court for the Southern District of Ohio**
Stanley M. Chesley, Waite, Schneider, Bayless & Chesley Co., L.P.A., John T. Johnson, Johnson & Dylewski, James T. Capretz, Capretz & Radcliffe, Brian R. Magana, Magana, Cathcart & McCarthy, Charles M. Wolfson, *Cross-Appellants (96-3744)/ Appellees*,	)	

Sidkoff, Pincus & Green, P.C.,	)
Wapner, Newman & Wigrizer,	)
Appellants (95-4054; 96-3774)/	)
Cross-Appellants (96-3740)/	)
Appellees,	)
	)
Elizabeth W. Ridgeway, et al.	)
On behalf of themselves and as	)
representatives on behalf of the	)
Pennsylvania Class Objectors,	)
Appellants (94-4322; 95-4054)/	)
Cross-Appellees,	)
	)
v.	)
	)
Pfizer, Inc., Shiley, Inc.,	)
Defendants-Appellees.	)

DECIDED AND FILED DECEMBER 12, 1996

Before: MARTIN, Chief Judge; KRUPANSKY and DAUGHTREY, Circuit Judges.

BOYCE F. MARTIN, JR., Chief Judge.

> Four hundred years ago William Shakespeare observed that lawyers "dream on fees." During the ensuing centuries, few lawyers, even in their wildest dreams, have envisioned fees such as those that have resulted from mass

tort litigation.[1]

Three separate parties in this heart-valve implant class action appeal district court orders relating to an award of fees to class and special counsel. Intervenors, who are absent class members, appeal the district court's denial of a motion to compel discovery of class counsel's fee-sharing agreements with special counsel. Class counsel cross-appeals the district court's award of attorneys' fees as insufficient. The Pennsylvania Class Objectors, another group of claimants composed of Elizabeth Ridgeway, Rosemary Grunsby, and Fred Grunsby, as well as the law firms of Sidkoff, Pincus & Green, P.C., and Wapner, Newman & Wigrizer, also appeal from the district court's order awarding attorneys' fees and expenses to class and special counsel.

These appeals arise out of a worldwide class-action settlement involving an allegedly defective heart valve implant. In 1992, a settlement agreement was reached between class counsel and the defendants. Although numerous objections to that settlement were filed, most of the objections were withdrawn before the district court approved the settlement. Prior to the district court's approval of the settlement, class counsel filed a motion to have several of the formerly objecting attorneys appointed as special counsel to class counsel. The district court approved the appointment, and the newly appointed special counsel subsequently entered into fee-sharing agreements with class counsel. The intervenors brought a motion to compel discovery of the fee-sharing agreements that remain undisclosed. The district

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[1] In re A.H. Robins Co., 86 F.3d 364, 367 (4th Cir. 1996) (citing Romeo and Juliet, Act 1, Scene 4).

court denied the motion.

In the meantime, class counsel filed a fee application in district court seeking $33 million in attorneys' fees. After removing himself from the attorneys' fees portion of the case, the original judge transferred the case to an out-of-circuit senior district judge. On March 1, 1996, after conducting a hearing on the attorneys's fees issue, the court awarded class and special counsel $10.25 million in attorneys fees and $476,938.06 in expenses from the settlement's medical and psychological, patient benefit, and spousal compensation funds to be split among the attorneys on a *pro rata* basis. *Bowling v. Pfizer*, 922 F. Supp. 1261 (S.D. Ohio 1996), *amended by* 927 F. Supp. 1036 (S.D. Ohio 1996). The court also recognized class and special counsels' continuing obligations to the class and ordered that those attorneys be permitted in the future to apply annually for additional fees and expenses in an amount not to exceed 10% of the annual $6.25 million payments to be made to the common funds by Pfizer and Shiley. The district court also granted $105,037.46 in fees and expenses to Public Citizen, Inc., but denied all other fee and expense requests.

Class and special counsel subsequently filed a motion to reconsider, alter, and amend the district court judgment. In an order entered on May 28, 1996, the district court denied that motion in part, but did increase the award of expenses to the attorneys by $75,344.10.

I

We review a district court's award of denial of attorneys' fees for an abuse of discretion. *Cramblit v. Fikse*, 33 F.2d 633, 634 (6th Cir. 1994). It is within the district

court's discretion to determine the "appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). The district court's award of attorneys' fees in common fund cases need only be "reasonable under the circumstances." *Id.* The Pennsylvania class objectors and class counsel separately contest the district court's award of attorneys' fees. After careful scrutiny of the alleged errors referenced by class counsel, we find that the district court did not abuse its discretion in its award of attorneys' fees.

The district court based its fee award on a percentage of the common fund and then cross-checked the fee against class counsel's lodestar. Applying this methodology, the district court awarded class and special counsel 10% of the $102.5 million that has been paid into the common fund to date,[2] an immediate award of $10.25 million plus expenses. In addition, class and special counsel could receive up to $6.25 million more over the next ten years because the district court permitted class and special counsel to petition for up to 10% of the $6.25 million annual payments set to be paid into the Patient Benefit Fund over the next 10 years. In determining whether this was a reasonable award, the district court examined the following six factors, stressing the first

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[2] The $102.5 million figure represents the amount of deposits which have been made by the defendants to date: $12.5 million in the Patient Benefit Fund, $80 million in the Medical and Psychological Consultation Fund, and $10million in the Spousal Compensation Fund.

two as the most important:

> (1) the value of the benefit rendered to the plaintiff class . . .;
> (2) the value of the services on an hourly basis;
> (3) whether the services were undertaken on a contingent fee basis;
> (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;
> (5) the complexity of the litigation; and
> (6) the professional skill and standing of counsel involved on both sides.

Bowling, 922 F. Supp. at 1280 (citing *Rawlings*, 9 F.3d at 516-17). As to the first factor, the district court, while recognizing that the settlement offered substantial benefits beyond the common fund, found that the *present* value was less than $165 million but indisputable exceeded $100 million. In calculating the value of services provided, the district court assumed that class and special counsel were entitled to compensation for every hour and expense listed by them and arrived at a unadjusted lodestar total of $4,945,022.42, an amount the court recognized as not commensurate with class and special counsel's $33 million fee request, even considering that the lodestar does not include services to be provided in the future. The district court then found that the case had been taken on a contingent fee basis, but was not persuaded by counsel's contention that the case was undesirable when undertaken. Furthermore, although the court stated that class counsel did make a substantial

investment of time and expenses when risk of nonrecoupment was still present, the early settlement and its approval significantly reduced the risk dramatically, and there was no contingency associated with future work in this case.

As to the last two factors, the court noted that the litigation was complex and the skill and standing of counsel was indeed high. The court also recognized that the quickness in which the result was obtained and the economies of scale involved in a class action of this size suggested that an award of 20% of the fund, *i.e.* $33 million, would be excessive.

These are the findings that provided the basis for the district court's award of attorneys' fees. The district court, in a thoroughly reasoned order, used the discretion granted it under *Rawlings* to determine an appropriate methodology and applied the *Rawlings* factors to ascertain a reasonable fee award. The fee is, at the very least, reasonable. Accordingly, we find that the district court did not abuse its discretion in its fee award to class and special counsel.

II

The intervenors also appeal the district court's denial of their motion to compel disclosure of the fee-sharing agreements between class and special counsel. "[W]e review discovery matters under an abuse of discretion standard." *Coleman v. American Red Cross*, 23 R.3d 1091, 1096 (6th Cir. 1994). "Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment." *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989). The magistrate, in reviewing the motion to compel disclosure of the agreements, balanced conflict of

interest concerns "against the fact that it is the district judge who will determine the fee amount" and found that it was appropriate to compel disclosure "to the district judge the fee information sought, but premature to decide who else, if anyone, should also see that information." The district court upheld the magistrate's ruling and denied the intervenor's motion, stating that it "will not become involved in how the counsel and court-appointed special counsel divide the total fee award."

Rule 26(b)(1) provides the general rule regarding the scope of discovery: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Fed.R.Civ.P. 26(b)(1). Because the district court, utilizing the factors addressed in the fee award discussion above, granted a percentage fee to both class counsel and special counsel, it is not entirely clear that the agreements are relevant to the district court's fee award decision. The district court examined the work performed by class and special counsel and the value their work conferred upon the class. Thus, the district court decided exactly what that group of attorneys' work was worth and then awarded a fee commensurate with that worth. How special counsel and class counsel ultimately divide that fee among themselves appears to be irrelevant. As long as class and special counsel are paid only what their collective work is worth, their distributions among themselves, even if done in a manner unrelated to the services a particular counsel has performed for the class, will no way harm the class or negatively impact the fund from which the

class's benefit is measured.[3]

Contrary to the intervenors' assertions, *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926, 108 S.Ct. 289, 98 L.Ed. 2d 249 (1987), does not require discovery of these agreements. Although *Agent Orange* does indeed stress the need to have these agreements disclosed, it only required that "in all future class actions counsel must inform the court of the existence of a fee sharing agreement at the time it is formulated." *Id.* at 226 (emphasis added). In doing so, the Second Circuit explained that "[o]nly by reviewing the agreement prospectively will the district courts be able to prevent potential conflicts from arising." *Id.* Thus, the Second Circuit did not address disclosure of these agreements to the other parties involved, and it certainly did not require such disclosure. Accordingly, the district court, given the questionable relevance of the fee arrangements, did not abuse its discretion in requiring only *in camera* disclosure of the agreements. We do not rule out the possibility, however, that a different manner of determining fees in subsequent fee

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[3] We note, however, that these agreements are only "irrelevant" because the settlement has already been approved and only the propriety of the fee award is before the Court. These agreements should certainly raise questions at the settlement approval stage. The risk that counsel has in some way been "bought off" and provided with a significant incentive to not represent the class's interest would clearly make these agreements relevant at that settlement stage of the proceedings. The settlement stage has passed, however, and the only question before this Court concerns the appropriateness of the district court's fee allocation.

applications might warrant disclosure of the agreements.

Accordingly, we affirm the district court's award of attorneys' fees and its denial of the motion to compel discovery of the fee-sharing agreements between class and special counsel.

EXHIBIT B

Nos. 94-4322; 95-4054; 96-3568/3740/3744/3774

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
DECEMBER 16, 1996
LEONARD GREEN, CLERK

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Arthur Ray Bowling, et al., *Plaintiffs-Appellees*,	)	
Jeffrey A. Crane, Gene Randall, Gerard Benedik, *Intervenors-Appellants (96-3568)/ Cross-Appellees*,	)	
Stanley M. Chesley, Waite, Schneider, Bayless & Chesley Co., L.P.A., John T. Johnson, Johnson & Dylewski, James T. Capretz, Capretz & Radcliffe, Brian R. Magana, Magana, Cathcart & McCarthy, Charles M. Wolfson, *Cross-Appellants (96-3744)/ Appellees*,	)	**ORDER**

Sidkoff, Pincus & Green, P.C.,)
Wapner, Newman & Wigrizer,)
Appellants (95-4054; 96-3774)/)
Cross-Appellants (96-3740)/)
Appellees,)
)
Elizabeth W. Ridgeway, et al.)
On behalf of themselves and as)
representatives on behalf of the)
Pennsylvania Class Objectors,)
Appellants (94-4322; 95-4054)/)
Cross-Appellees,)
)
v.)
)
Pfizer, Inc., Shiley, Inc.,)
Defendants-Appellees.)
_____/

BEFORE: MARTIN, Chief Judge, Krupansky, Daughtrey, Circuit Judges.

In Order to ensure all appeals in the above-styled cases are resolved, it is hereby ordered that all judgments of the district court are affirmed. All motions pending before this Court are hereby denied.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

/S_____
LEONARD GREEN, Clerk

CERTIFICATE OF SERVICE

I, Larry M. Keller, hereby certify that I served a true and correct copy of the foregoing document upon the following by U.S. first class mail, postage pre-paid:

Stanley M. Chesley, Esq.
WAITE, SCHNEIDER, BAYLESS & CHESLEY
Suite 1513 Central Trust Tower
Fourth and Vine Streets
Cincinnati, OH 45202

David Klingsberg, Esq.
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, NY 10022

James R. Frost, Esq.
FROST & JACOBS
Central Trust Tower, Suite 2500
201 East 5th Street
Cincinnati, OH 45202

Mary Griffin, Esq.
Consumers Union of the U.S., Inc.
1666 Connecticut Avenue, NW
Suite 210
Washington, DC 20009

Brian Wolfman, Esq.
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009

/S/_____
Larry M. Keller

Date: Dec. 24, 1996

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al., *Plaintiffs*,	)	
	)	**Case No.**
v.	)	**C-1-91-256**
	)	**John F. Nangle,**
PFIZER, INC., et al., *Defendants.*	)	**Judge**

REQUEST UNDER FED.R.CIV.PRO. 54 (d)(2)(C) BY THE PENNSYLVANIA CLASS OBJECTORS (AS CLASS MEMBERS) FOR ADVERSARY SUBMISSIONS AND OBJECTIONS AND MEMORANDUM OF THE PENNSYLVANIA CLASS OBJECTORS, AND THEIR COUNSEL TO THE REQUEST FOR FEES AND EXPENSES OF CLASS COUNSEL AND SPECIAL COUNSEL

The "objectors" which are the class members known in this case previously as the Pennsylvania Class Objectors ("PCO") and their attorneys, (Green and Wapner), respectfully object, to the extent permitted by the Order dated August 14, 1995 (*Setting Hearings On Applications For*

Attorneys Fees), to the fees sought in the "application for attorney's fees and reimbursement of costs and expenses of Stanley Chesley", as that phrase is used in the said Order, as well as to the applications for fees make by the "Special Counsel". In addition, PCO requests that the Court provide the opportunity for adversary submissions under Fed.R.Civ.Pro. 54(d)(2)(C), and that the Court direct the matter be heard on oral sworn testimony and/or depositions. In support of their positions, the Objectors assert the following:

1. Based on the language in the August 14, 1995 Order, Objectors (PCO, Green and Wapner) understand (but are not sure) that they have not been afforded the right and/or privilege of objecting to the fee application of class counsel since the Order states, "any participant wishing to object to an application shall file same, along with supporting memoranda . . .", but seems to limit who qualifies as a *participant*, as follows, "only Messrs. Chesley, Wolfman and a representative of defendants, shall participate as attorneys in said hearing".

2. To make their position clear that they do object to the fee application of Class Counsel and Special Counsel (in the event that their understanding of the Order is not accurate), but at the same time to not burden the Court with paper the Court does not want to read, (if Objectors are correct in their understanding of the said Order), Objectors have filed this document in abbreviated format.

3. Objectors incorporate by reference here at, as their objections and memorandum, the portion of their brief to the United States Court of Appeals for the Sixth Circuit that they have already supplied to Judge Nangle, as well as their various objections, papers and briefs filed of record as part of the Fairness Hearing proceedings, and as part of the fee application of Green and Wapner.

4. In addition, Objectors assert the following:

a) The time records of Class Counsel and Special Counsel are demonstrably inaccurate, inflated and unreliable;

b) When confronted at the Fairness Hearings with valid objections asserted by some of the attorneys for objecting class members, rather than improving the settlement, or addressing the substance of the objections, Class Counsel entered into contracts to pay a portion of his expected attorney's fee to these lawyers. The lawyers "suddenly" represented "former objectors", and at the same time, Class Counsel anointed these lawyers as his "Special Counsel". This cynical process is a mockery of Rule 23 and the Federal Court supervising the class action and awarding fees;

c) Class Counsel never seriously litigated this case, nor does it appear that he intended to litigate it. This case was commenced after Class Counsel knew it would be promptly settled; and he settled the case before he had sufficient knowledge of the legal and medical issues. Class Counsel settled also before he had a reasonable understanding of the terms of the settlement defendants proposed, yet he accepted it without doing any independent evaluation. This is hardly worth the gigantic reward he now seeks.

d) Class Counsel made representations of fact at the Fairness Hearing and apparently tried intentionally to confuse the record. This did not serve the interests of the class. Moreover, the post settlement scientific *discoveries of diagnostic techniques* made by defendants, (in research that started before this settlement was approved, and was budgeted by defendants, separate and apart from this settlement), establish that the settlement does not provide the benefits to the class touted by Class Counsel. In fact, the value of the settlement, beyond the small cash sum to be paid to class members, is debatable.

5. Objectors currently have pending in the Court of Appeals for the Sixth Circuit, an appeal of the district court's

denial of their motions to intervene. The appeal has survived motions to dismiss filed by Appellees, and is awaiting an argument and/or disposition date from the Sixth Circuit. If Objectors succeed in their appeal, it is possible, and likely that the result could have an impact on this Court's decision concerning attorney's fees. Therefore, it may be prudent for this Court to defer its ruling until after the appeal shall have been decided.

6. Objectors have filed with this Court previously a motion under Rule 59(e) seeking to amend the said Order and to participate orally in the hearing concerning Class Counsel's fees. The PCO, as class members, hereby request, pursuant to Fed.R.Civ.Pro. 54 (d)(2)(C) an opportunity for adversary submissions in accordance with Rule 43(e), and in particular, they ask that the Court direct the matter be heard on oral sworn testimony and/or depositions. If the Objectors' Rule 59(e) motion is granted, or if the PCO's request under Rule 54(d)(2)(C) is allowed, PCO and/or Objectors seek the opportunity to supplement and enlarge their objections and memorandum.

WHEREFORE, Objectors respectfully request that this Honorable Court grant the PCO's request under Rule 54 (d)(2)(C) and provide whatever relief is just and appropriate under the circumstances.

/S/_____
Gary Green
Larry M. Keller

Morton B. Wapner
Attorneys for Pennsylvania Class Objectors

OF COUNSEL:
SIDKOFF, PINCUS & GREEN, P.C.
2700 ARAMARK TOWER
1101 MARKET STREET
PHILADELPHIA, PA 19107
(215) 574-0600

WAPNER NEWMAN & ASSOCIATES
115 SOUTH 21ST STREET
PHILADELPHIA, PA 19103-4433
(215) 569-0900

DATE: August 29, 1995

CERTIFICATION OF SERVICE

I, Gary Green, Esq., hereby certify that I served a true and correct copy of the foregoing document upon the following on today's date by U.S. first class mail:

Stanley M. Chesley, Esq.
WAITE, SCHNEIDER, BAYLESS & CHESLEY
Suite 1513 Central Trust Tower
Fourth and Vine Streets
Cincinnati, OH 45202

David Klingsberg, Esq.
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, NY 10022

James R. Adams, Esq.
FROST & JACOBS
Central Trust Tower, Suite 2500
201 East 5th Street
Cincinnati, OH 45202

James T. Capretz, Esq.
5000 Birch Street
West Tower, Suite 2500
Newport Beach, CA 92660

James T. Capretz, Esq., Special Counsel
c/o Capretz & Radcliffe
5000 Birch Street
West Tower, Suite 2500
Newport Beach, CA 92660

Lewis J. Saul, Esq.
5335 Wisconsin Avenue, NW
Suite 820
Washington, DC 20015

John T. Johnson, Esq.
Johnson & Dylewski
Two Houston Center
909 Fannin, Suite 3220
Houston, TX 77010

Brian Wolfman, Esq.
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009

Charles Wolfson, Esq.
Wolfson Law Offices
MacMillan Court
Cnr Barrenjoey Road & Avalon Pde, Suite 8
Avalon NSW 2107, Australia

Brian R. Magana, Esq.
Magana, Cathcart & McCarthy
Suite 810 Gateway West Bldg
1801 Avenue of the Stars
Los Angeles, CA 90067

Kenneth Kasdan, Esq.
Kasdan, Simonds, Peterson, McIntyre, Epstein & Martin
2091 Business Center Drive, #200
Irvine, CA 92715-1156

/S/_____
Gary Green

Date: August 29, 1995

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al., *Plaintiffs*,	)	
	)	**Case No. C-1-91-256**
v.	)	**John F. Nangle, Judge**
	)	**Expedited Consideration Requested**
PFIZER, INC., et al., *Defendants*.	)	

MOTION BY COUNSEL FOR PENNSYLVANIA CLASS OBJECTORS (GREEN, ET AL. AND WAPNER, ET AL.) AND PENNSYLVANIA CLASS OBJECTORS FOR DISCOVERY AND AN EVIDENTIARY HEARING

Sidkoff, Pincus & Green, P.C. ("Green") and Wapner, Newman & Wigrizer ("Wapner") on their behalf, and as counsel for the persons identified previously in this case as the PA Class Objectors ("PCO") who are members of this class, hereby move for discovery and an evidentiary hearing on matters raised by *Class Counsel's and Special Counsels' Memorandum in Opposition to the Requested*

Award of Fees and Expenses to Sidkoff, Pincus & Green, P.C. and Wapner ,Newman & Wigrizer and state as follows:

1. On July 14, 1995, the law firm of Sidkoff, Pincus & Green, P.C. ("Green") and Wapner, Newman & Wigrizer ("Wapner") filed their Supplemental Application for fees and costs.

2. On or about August 24, 1995, the PCO received a copy of *Class Counsel's and Special Counsels' Memorandum in Opposition to the Requested Award of Fees and Expenses to Sidkoff, Pincus & Green, P.C. and Wapner, Newman & Wigrizer* ("Response"), filed in this case.

3. In Class Counsel' Stanley Chesley's Response, he is attempting to enter on the record for the first time in this case, facts, through argument, which up until the present have not been part of this case.

4. In Mr. Chesley's Response, he alleges without any factual basis that, *inter alia*, that Sidkoff, Pincus & Green, P.C. and Wapner, Newman & Wigrizer ("PA Attorneys") were not responsible for any enhancements to the *Bowling* settlement and that enhancements to the *Bowling* settlement arouse from Public Citizen and Special Counsel (pp. 7-12); the PA Attorneys acted with total disregard for the interests of the *Bowling* Class by making unsubstantiated accusations of collusion and fraud (pp. 12-15); the *Bowling* settlement was not patterned after the draft of a settlement agreement given to the Defendants in *Taylor v. Shiley*, the Pennsylvania class action in which the PA Attorneys are representing a non-fracture heart valve class (pp. 15-22); the *Bowling* settlement document "bears no proposed resemblance to the Taylor settlement" (p. 16); "the *Bowling* settlement is a sophisticated agreement without precedent in the products liability field and one which resulted from long and hotly contested negotiated with the Defendants" (p. 17); the true meaning of statements made by Defendants' counsel in *Taylor*

to a Court of Common Pleas of Philadelphia County which relate to the PA Attorney's role in the *Bowling* settlement are not as represented by the PA Attorneys (p. 22); and that the PA Attorneys obtained no results for the *Bowling* class (p. 26).

5. Mr. Chesley has now, through argument, attempted to place unsubstantiated facts on the record in this case.

6. Currently pending before the Court are the Fee Applications of Mr. Chesley and Special Counsel, Brian Wolfman, Esquire of Public Citizen, and the PA Attorneys, who are all competing for their respective share of one fee to be awarded.

7. The Court should base its decision on the pending fee applications on facts, not Mr. Chesley's rhetoric and unsupported allegations.

8. Based upon Mr. Chesley's Response to the PA Attorneys Fee Application, and his attempt to enter new facts on the record, which are now seriously disputed by the PA Attorneys, the factual disputes can only be resolved through discovery, such as depositions and an evidentiary hearing which includes cross examination of witnesses.

9. In his Response, Mr. Chesley states that the enhancements to the *Bowling* settlement were negotiated prior to the fairness hearing. In support of this allegation, he cites to the time records of James Capretz, Esq., John Johnson, Esq. and himself. However, there is no evidence of agreements to enhance the settlement *prior* to the fairness hearing and the Court should not accept only attorney time records to substantiate this allegation. This allegation should be subject to depositions and other discovery.

10. Mr. Chesley also alleges that the *Bowling* settlement was not patterned after the Settlement Memorandum submitted by the PA Attorneys to Defendants in *Taylor v. Shiley*. These statements are in direct conflict

with representations made by Defendants' attorneys to both Judge Spiegel and Judge Lord in *Taylor*. (David Klingsberg, N.T. 6/8/95, p.85; Exhibit "C" to Supplemental Application of Sidkoff, Pincus & Green, P.C. and Wapner, Newman & Wigrizer for attorneys fees). Depositions are now needed of Defendants' counsel so that this factual dispute can be resolved.

11. Mr. Chesley's Response continually misrepresents the relief requested by the PCO during the fairness hearings. Mr. Chesley states that the PCO opposed the *Bowling* settlement. To the contrary, the PCO did not oppose the settlement, but sought to have a Pennsylvania subclass certified since the PCO were entitled to better relief as compared to the rest of the *Bowling* Class, based upon the law in Pennsylvania and the favorable ruling achieved by the PA Attorneys in *Taylor v. Shiley*. Also, through their objections, the PA Attorneys were only trying to obtain an enhanced settlement for the entire class since they believed that Defendants would have offered additional benefits had they been pressed by Class Counsel.

12. Mr. Chesley chides the time spent by the PA Attorneys in *Bowling*, stating that it exceeds his own time. However, if one compares the number of pages of the PCO's filings to those of Mr. Chesley's, it is apparent that the PA Attorneys time would exceed Mr. Chesley's. Mr. Chesley relied upon the Defendants to oppose the PCO's efforts to enhance the settlement and Mr. Chesley merely sat back as an observer in the confrontation. The reason for this is obvious. Mr. Chesley knew that he would be awarded the same fee whether he fought the PCO or not. Again, discovery is needed on this issue, particularly the depositions of Defendants' counsel.

13. Mr. Chesley alleges that the statements of Defendants' counsel made to the Court of Common Pleas in *Taylor v. Shiley*, concerning the PA Attorneys contribution to

the Bowling settlement are not as represented by the PA Attorneys. Therefore, the PA Attorneys should be allowed to take the depositions of Defendants' counsel in *Taylor v. Shiley* and Defendants' counsel in *Bowling* to develop a factual record to resolve this dispute. (See, Exhibit "C" to Supplemental Application of Sidkoff, Pincus & Green, P.C. and Wapner, Newman & Wigrizer for Attorneys Fees and Reimbursement of Costs and Expenses, Notes of Testimony before Judge Lord).

14. Throughout this case, Mr. Chesley has opposed the taking of any discovery or evidence on factual issues in this case and has repeatedly taken affirmative steps to oppose all discovery requests (R.76: Motion by plaintiff for protective order preventing deposition of Stanley M. Chesley; [1]R.216: Motion by plaintiff class counsel for protective order; R.248: Response by Class Counsel to PA Class Objectors request for the Taking of Discovery and for an Evidentiary Hearing; R.298: Motion by plaintiffs' Class Counsel for protective order, and to quash subpoena duces tecum; R.443: Motion by plaintiffs for limitations upon discovery; and R.536: Memorandum by plaintiffs in opposition to motion to compel).

15. For over three (3) years Mr. Chesley has opposed the taking of depositions and any other discovery relating to the class action settlement and/or the negotiations leading up to the settlement.

16. Mr. Chesley's actions insured that Judge Spiegel would be prevented from learning any relevant facts relating to the case by his persistent opposition to legitimate discovery requests and requests for evidentiary hearing.

17. Based upon Mr. Chesley's Response to the PA

---

[1] "R.___" are references to the docket numbers in this case.

Attorneys' Fee Application, he has placed at issue in this case *serious* factual disputes which the Court must resolve prior to ruling on the pending fee applications.

18. Only by allowing discovery, such as *depositions* and through an evidentiary hearing, with sworn testimony and cross examination, can these factual disputes be resolved.

WHEREFORE, Movants respectfully request that this Honorable court allow discovery including depositions to proceed on the factual issues relating to the pending fee applications and thereafter, hold an evidentiary hearing in this matter.

Respectfully submitted,

/S/_____
Gary Green
Larry M. Keller

Morton B. Wapner
Attorneys for Movants

OF COUNSEL:
SIDKOFF, PINCUS & GREEN, P.C.
2700 ARAMARK TOWER
1101 MARKET STREET
PHILADELPHIA, PA 19107
(215) 574-0600

WAPNER NEWMAN & ASSOCIATES
115 SOUTH 21ST STREET
PHILADELPHIA, PA 19103-4433
(215) 569-0900

DATE: August 25, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al., *Plaintiffs*,	)	
	)	**Case No. C-1-91-256**
v.	)	**John F. Nangle, Judge**
	)	**Expedited Consideration Requested**
PFIZER, INC., et al., *Defendants*.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY COUNSEL FOR PENNSYLVANIA CLASS OBJECTORS (GREEN, ET AL. AND WAPNER, ET AL.) AND PENNSYLVANIA CLASS OBJECTORS FOR DISCOVERY AND AN EVIDENTIARY HEARING

Based upon Mr. Chesley's *Memorandum in Opposition to the Requested Award of Fees and Expenses to Sidkoff, Pincus & Green, P.C. and Wapner, Newman & Wigrizer* ("Response") he has attempted to place unsubstantiated facts on the record through argument. In light of the serious factual disputes which have now arisen, discovery (including depositions) is necessary to resolve the factual disputes. Although Mr. Chesley has persistently objected to engaging in any discovery after the class action settlement was entered into, he now should be required to engage in discovery to support his unsubstantiated allegations

made in his Response. Moreover, the Court must hold an evidentiary hearing to resolve the factual disputes which have been raised in Mr. Chesley's Response, prior to ruling on the pending fee applications.

Among Mr. Chesley's unsubstantiated statements in his Response, he states that the PA Attorneys did nothing to enhance the *Bowling* Settlement. This statement is remarkable in light of his previous position in this case. Who said to Judge Spiegel:

> **Mr. Chesley:**
>
> . . . and the consideration is the objectors, and the fact that certain things were brought to the court's attention by Mr. Green and Mr. Wapner and they would be entitled to a fee in that regard. And so there is one fee --
>
> **Judge Spiegel:**
>
> I indicated if they had done anything to improve the lot of the class, that they would be entitled to file an application for fees. ***I think they did.***
>
> **Mr. Chesley**:
>
> Yes, ***they did***, your Honor.

Stanley Chesley to Judge Spiegel. N.T. 12/28/92, p. 6,7 (emphasis added)

Since Mr. Chesley now has changed his "tune" as to the PA Attorneys role improving the *Bowling* settlement, the PA Attorneys should be allowed to take Mr. Chesley's deposition on the issues of fact raised in his Response. Mr. Chesley has now place on the record two different statements with respect to the PA Attorneys' role in achieving

enhancements for the *Bowling* class. Discovery is now needed so that the PA Attorneys can depose Mr. Chesley *under oath* so that he is answerable for his statements to Judge Spiegel on December 28, 1992.

Mr. Chesley's Response is replete with misrepresentations and unsupported factual assertions. For instance, he states that Judge Spiegel in his opinion approving the Bowling settlement held that the PCO's claim that it was entitled to a sizeable recovery was not supported under Pennsylvania law. Judge Spiegel in his opinion cited the case of *Brinkman v. Shiley*, 732 F.Supp. 33, *aff'd.*, 902 F.2d 1558 (3d Cir. 1989) as the basis for his interpretation of Pennsylvania law. However, Judge Spiegel's interpretation of Pennsylvania law was incorrect as evidenced by the recent holding of the Third Circuit in *Michaels v. Shiley*, 46 F.3d 1316 (3d Cir. 1995) (district court's dismissal of fraud and express warranty claims reversed).

Where there are contested issues of fact on fact on attorney's fee petitions (such as here), an *evidentiary* hearing is required by the district court before the court determines a fee award. *See, Blum v. Stensen*, 465 U.S. 886, 892, f.n. 5 (1984). This evidentiary hearing must include cross examination. See, City of Detroit v. Grinnell Corporation, 495 F.2d 448, 473 (2d Cir. 1974).

Accordingly, Movants respectfully request that their Motion for Discovery and an Evidentiary Hearing be granted.

Respectfully submitted,

/S/_____
Gary Green
Larry M. Keller

Morton B. Wapner
Attorneys for Movants

OF COUNSEL:
SIDKOFF, PINCUS & GREEN, P.C.
2700 ARAMARK TOWER
1101 MARKET STREET
PHILADELPHIA, PA 19107
(215) 574-0600

WAPNER NEWMAN & ASSOCIATES
115 SOUTH 21ST STREET
PHILADELPHIA, PA 19103-4433
(215) 569-0900

DATE: August 25, 1995

CERTIFICATION OF SERVICE

I, Larry M. Keller, Esq., hereby certify that I served a true and correct copy of the foregoing document upon the following on today's date by U.S. First Class Mail:

Stanley M. Chesley, Esq.
WAITE, SCHNEIDER, BAYLESS & CHESLEY
Suite 1513 Central Trust Tower
Fourth and Vine Streets
Cincinnati, OH 45202

David Klingsberg, Esq.
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, NY 10022

James R. Adams, Esq.
FROST & JACOBS
Central Trust Tower, Suite 2500
201 East 5th Street
Cincinnati, OH 45202

James T. Capretz, Esq.
5000 Birch Street
West Tower, Suite 2500
Newport Beach, CA 92660

James T. Capretz, Esq., Special Counsel
c/o Capretz & Radcliffe
5000 Birch Street
West Tower, Suite 2500
Newport Beach, CA 92660

Lewis J. Saul, Esq.
5335 Wisconsin Avenue, NW
Suite 820
Washington, DC 20015

John T. Johnson, Esq.
Johnson & Dylewski
Two Houston Center
909 Fannin, Suite 3220
Houston, TX 77010

Brian Wolfman, Esq.
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009

Charles Wolfson, Esq.
Wolfson Law Offices
MacMillan Court
Cnr Barrenjoey Road & Avalon Pde, Suite 8
Avalon NSW 2107, Australia

Brian R. Magana, Esq.
Magana, Cathcart & McCarthy
Suite 810 Gateway West Bldg
1801 Avenue of the Stars
Los Angeles, CA 90067

Kenneth Kasdan, Esq.
Kasdan, Simonds, Peterson, McIntyre, Epstein & Martin
2091 Business Center Drive, #200
Irvine, CA 92715-1156

/S/_____
Larry M. Keller

Date: August 25, 1995

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al., *Plaintiffs*,	)	
	)	**Case No. C-1-91-256**
v.	)	**S. Arthur Spiegel, Judge**
	)	**Expedited Consideration Requested**
PFIZER, INC., et al., *Defendants*.	)	

MOTION UNDER RULE 59(e) BY COUNSEL FOR PENNSYLVANIA CLASS OBJECTORS (GREEN, ET AL. AND WAPNER, ET AL.) AND PA CLASS OBJECTORS FOR RIGHT TO PARTICIPATE IN THE HEARING ON THE APPLICATIONS OF MESSRS. CHESLEY AND WOLFMAN

Sidkoff, Pincus & Green, P.C. ("Green") and Wapner, Newman & Wigrizer ("Wapner") on their own behalf, and as counsel for the persons identified previously in this case as the PA Class Objectors ("PCO") who are members of this class, hereby move the court to reconsider

the Order entered by the Honorable John F. Nangle on August 11, 1995 (Order setting hearing on application for attorneys' fees) and for the right to participate in the hearing on the applications of Messrs. Chesley and Wolfman (and any other counsel). In support of same, Movants state as follows:

1. At the outset, throughout and at the end of the Fairness Hearings, Judge Spiegel stated and emphasized that there would be "one" counsel fee that was to be divided among those attorneys who were found to have a right to a fee.

2. Judge Spiegel invited Green and Wapner to file a fee petition along with other counsel in the case, and indeed allowed them initially to file a *pro forma* application for fees due to the intended appeal of the PCO.[1]

3. Under the doctrine of *law of the case*, and because of precedent established by Judge Nangle[2], it appears that the original one fee approach announced by Judge Spiegel may, and probably will be applied by Judge Nangle.

4. Under the Court's Order of August 11, 1995, the PCO would have no right to object or to comment upon to any aspect of the presentations made by Messrs. Chesley and Wolfman. This prejudices the rights of the PCO as well as all other class members (whether they objected or not) since the size of the fee, if it is a percentage, will be deducted from the funds available under the settlement for class members. Moreover, PCO (and other class members) will have no right to argue to the court that based on the conduct

---

[1] N.T. 9/9/92, p. 54.

[2] In re Chrysler Motors Corporation Overnight Evaluation Program Litigation, 736 F. Supp. 1007 (E.D. Mo. 1990).

of counsel for the class and/or services provided by any other counsel, the amount sought is neither warranted by the record nor properly allowable under the law.

5. Green and Wapner, under a *one fee* regime, are in direct competition with Messrs. Chesley and Wolfman for a percentage portion of the *one fee*. While Green and Wapner should be accorded equal standing with Messrs. Chesley and Wolfman as lawyers who filed fee petitions, the Order relegates them to second class citizenship.

6. Under the Order of August 11, 1995, Green and Wapner will have no say in arguing against the fee application of Messrs. Chesley and Wolfman (at the separate hearing set for 9:30 a.m. to no later than 11:30 a.m. on September 14, 1995), but Messrs. Chesley and Wolfman have been granted the opportunity and right to participate and object in the hearing for fees requested by Green and Wapner (at the second hearing held from 11:30 a.m. until no later than 1 p.m.)

7. The Order dated August 11, 1995 varies significantly from the Stipulation signed by counsel for all parties (filed August 11, 1995), attached hereto as Exhibit "A".[3]

8. There is no rational, equitable or legal reason for allowing Messrs. Chesley and Wolfman to argue against, object to, and share the time at the hearing set for the fee application of Messrs. Green and Wapner, but to deprive Messrs. Green and Wapner a like opportunity to argue against, object to and share in the time at the hearing set for

---

[3] Under the Stipulation at ¶ 5, Green and Wapner would have been permitted to raise objections to the application for fees filed by other attorneys (including, *inter alia*, Chesley), and at the hearing to "be heard", to "have the opportunity to address the Court", and to make argument.

the fee application of Messrs. Chesley and Wolfman.

9. The Order dated August 11, 1995 was the product of a process during which the Court consulted with Messrs. Chesley and Wolfman, thus giving them unfair and unwarranted tactical advantages in connection with how the hypothesized *one fee* would be determined and awarded by the Court. Messrs. Green and Wapner, although they had an interest in the *one fee* by reason of their participation in the case, benefits they achieved for the class, and the fact that they have filed an application for fees, were excluded from participating in the conference when the protocol for the hearing was discussed. As a result, the protocol embodied in the Order dated August 11, 1995 is prejudicial to the PCO and their counsel, and has the appearance of unfairness. Since the record establishes that up to 28% of the class members who received large size valves and 10% of the entire *Bowling* class are simultaneously represented by the PCO in an action in Pennsylvania, the views of the PCO should have been sought. Judge Nangle had no opportunity to consider the views of the Movants when entering the Order.

10. There are numerous factual disputes that pertain to the amount of a fee to which Mr. Chesley is entitled. These disputes are in the record (and a summary of which are set forth in the portions of the PCO's brief filed with the Sixth Circuit, a copy of which is attached hereto and incorporated herein by reference as Exhibit "B"). However, the record is huge and it is unlikely Judge Nangle will have an opportunity prior to the hearing to become familiar with all of the material issues raised by the factual disputes.

11. As a result of these factual disputes, Movants are entitled to an evidentiary hearing prior to the setting of a fee for Mr. Chesley since under applicable law, this Court must make findings of fact to justify a fee award.

12. For the reasons mentioned above, the protocol

established by the Order dated August 11, 1995 virtually eliminates the ability of the court to resolve the factual disputes when deciding fees. At the Fairness Hearing, Judge Spiegel disallowed any evidence, and made the Court's Fairness Hearing rulings on the basis of arguments of counsel, notwithstanding offers by Movants to introduce evidence, and request made by them to cross-examine counsel for the class. Therefore, without an evidentiary hearing on class counsel's fee application, there will be no competent evidence whatsoever in the record to resolve the disputed facts which, if proven to be true, might require Mr. Chesley's fee to be diminished and reduced from that which he requested.

WHEREFORE, Movants respectfully request that this Honorable Court reconsider the Order dated August 11, 1995, allow Wapner and Green to object and participate in the hearing on the fee application hearing of other counsel, including Messrs. Chesley and Wolfman, and provide whatever other relief is just and appropriate under the circumstances.

Respectfully submitted,

/S/_____
Gary Green
Larry M. Keller

Morton B. Wapner
Attorneys for Pennsylvania
Class Objectors

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
2700 ARAMARK TOWER
1101 MARKET STREET
PHILADELPHIA, PA 19107
(215) 574-0600

WAPNER NEWMAN & ASSOCIATES
115 SOUTH 21ST STREET
PHILADELPHIA, PA 19103-4433
(215) 569-0900

DATE: August 18, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al., *Plaintiffs*,	)	
	)	**Case No. C-1-91-256**
v.	)	**S. Arthur Spiegel, Judge**
	)	**Expedited Consideration Requested**
PFIZER, INC., et al., *Defendants*.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION UNDER RULE 59(e) BY COUNSEL FOR PENNSYLVANIA CLASS OBJECTORS (GREEN, ET AL. AND WAPNER, ET AL.) AND PA CLASS OBJECTORS FOR RIGHT TO PARTICIPATE IN THE HEARING ON THE APPLICATIONS OF MESSRS. CHESLEY AND WOLFMAN

Movants have standing to file a fee petition and should have been included in the pre-hearing conference where the format was discussed.

The August 11, 1995 Order ("Order") denies Movants any standing to object to or present a position concerning fees sought by Messrs. Chesley and Wolfman. The Order seems to assume that merely because the PCO has been denied intervenor status, their counsel should be treated as outsiders at the fee hearing. However, the cases show that Green and

Wapner should be treated on an equal footing with other attorneys who seek fees from the single source fund that presumably will be used to pay the fees.[1]

The court in *Ace Heating & Plumbing Company, Inc., et al. v. Crane Company, et al.*, 453 F.2d 30, 35 (3d Cir. 1971) recognized that counsel for objectors are entitled to compensation and stated:

> We do not believe the trial court could deny compensation merely because a member of a class who opted in then opposed the settlement as unfair. Counsel was presumably advancing the legitimate rights of his client. *It would chill challenges to the fairness of a settlement to say that such action results in forfeiture of the right to be reimbursed for compensable legal services*. (emphasis added).

See also, Frankenstein v. McCrory, et al., 425 F.Supp. 762, 767 (S.D.N.Y. 1977).

The valuable role of objector in class action settlements was similarly recognized by the Second Circuit in *White, et al. v. Averback, et al.*, 300 F.2d 822, 828 (2d Cir. 1974):

> Accordingly, it is well settled that objectors have a *valuable and important role to perform in preventing collusive or otherwise*

---

[1] For example, if the court set the class' obligation for attorneys fees at fifteen percent (15%) of the recovery, Messrs. Chesley and Wolfman as will Green and Wapner would all be competing for their share of that fifteen percent (15%) attorney fee fund.

> *unfavorable settlements, and that, as the district court recognized, they are entitled to an allowance and compensation for attorneys' fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts*. (emphasis added).

The important role objectors perform as devil's advocate in class action litigation has been universally recognized by federal courts as a basis for fee awards to the objectors' counsel. *See, Homes v. Atkins*, 668 F.Supp. 1021, 1027 (E.D. Ky. 1987) (objectors' counsel awarded 10% of settlement fund, even though settlement *not* improved). *See also, Elliot v. Sperry Road Corp.*, 680 F.2d 1225, 1227 (8th Cir. 1982) (objectors contributing to adversarial nature of proceedings recognized, and attorneys fees awarded). In *County of Suffolk, et al. v. Long Island Lighting, et al.*, 907 F.2d 1295 (2d Cir. 1994), a district court denied attorneys fees to Suffolk County, an objector to a class action settlement that eventually opted out of the class. The Second Circuit reversed the district court, holding that it would be inequitable to Suffolk County, based upon Suffolk's efforts in improving the settlement to deny it attorney's fees. *Id.* At 1327. The fact that Suffolk County had opposed the settlement agreement did no justify a denial of an award of attorneys' fees. *Id.*

Additionally, counsel filing a fee petition have a right to fair notice and must be afforded an opportunity to be heard at the fee hearing. As the Third Circuit recognized in *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 584 (3d Cir. 1984):

> "Our equitable fund case law also makes clear that the attorneys' claim for fees from a fund in court is a cause of action,

belonging to the attorneys, for the reasonable value of their services, for which a hearing is required. As we observed in *Lindy I*:

> Much of the evidence on which the judge will base his award or denial of fees may be disputed; the evidence presented by an attorney petitioning for fees may be incomplete. The denial of fees obviously harms the petitioning attorney. Just as obviously, award of attorneys' fee harms the unrepresented claimant by reducing his net recovery. These opposing interests should be afforded a hearing to provide an evidentiary basis for resolution of disputed factual mattes and to allow the parties to supplement possibly incomplete statements of opposing parties.

487 F.2d at 169. *See also Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 167 n.5 (3d Cir. 1975). Plainly, therefore, the hearing on a fee application in an equitable fund case requires compliance with those procedural rules which assure fair notice and an adequate opportunity to be heard. Equally plainly, the requirement of an evidentiary hearing demands the application in the hearing, of the Federal Rules of Evidence. Fed.R.Evid. 1101(b) (rules apply generally to civil actions)."

Moreover, where there are contested issues of fact on attorneys' fee petitions (such as here), an *evidentiary* hearing

is required by the district court before the court determines a fee award. *See, Blum v. Stensen*, 465 U.S. 886, f.n. 5 (1984). This evidentiary hearing must include cross examination. *See, City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 473 (2d Cir. 1974).

Accordingly, the court is asked to reconsider the Order and grant the relief requested.

Respectfully submitted,

/S/_____
Gary Green
Larry M. Keller

Morton B. Wapner
Attorneys for Pennsylvania
Class Objectors

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
2700 ARAMARK TOWER
1101 MARKET STREET
PHILADELPHIA, PA 19107
(215) 574-0600

WAPNER NEWMAN & ASSOCIATES
115 SOUTH 21ST STREET
PHILADELPHIA, PA 19103-4433
(215) 569-0900

DATE: August 18, 1995

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al., *Plaintiffs*,	)	
	)	**Case No. C-1-91-256**
v.	)	**S. Arthur Spiegel, Judge**
	)	**RECEIVED AUG 11 1995 KENNETH J. MURPHY,**
PFIZER, INC., et al., *Defendants*.	)	

STIPULATION

The undersigned hereby stipulate and agree that:

1. Applications for an award of attorney fees and expenses to Class Counsel, Special Counsel, Counsel for Public Citizen and Gary Crane, et al., the attorneys for the Pennsylvania Class Objectors and all other entities who have made application to the Court for an award of attorneys fees and/or expenses in this matter, shall be heard by the Honorable John F. Nangle, sitting by designation and appointment of the Honorable William H. Rehnquist, Chief Justice of the United States Supreme Court.

2. These hearings shall take place on the following date

and place:

SEPTEMBER 14, 1995
Potter Stewart U.S. Courthouse Building
Room 838
100 East Fifth Street
Cincinnati, OH 40202

3. The Court has indicated that the hearing addressing the applications for an award of attorneys fees and expenses to Class Counsel, Special Counsel, Counsel for Public Citizen and Gary Crane, et al., and other entities, and any objections thereto, shall begin at 9:00 a.m. (Eastern Daylight Savings Time).

4. The Court has indicated that the hearing addressing the application for an award of attorneys fees and expenses to the attorneys for the Pennsylvania Class Objectors, and any objections thereto, shall follow thereafter.

5. All counsel and their experts, if any, or entities whose petitions for an award for attorneys fees and/or expenses, or objectors thereto, will be heard and shall have the opportunity to address the Court is they so Choose, and to respond to the Court's questions. Counsel for defendants may participate as well, of they so choose. The Court will hear argument on the issues of the amount of attorneys fees and expenses to be awarded and any objections thereto. The Court will advise prior to the hearing whether it will also hear argument as to the procedure to be used for payment and the funds from which payment shall be made.

6. The Court has indicated that it will hear no sworn

testimony and the counsel or other entities who appear before the Court shall not be subject to cross-examination by other participants.

/S/_____
STANLEY M. CHESLEY, 0000852
Waite, Schneider, Bayless &
Chesley Co., LPA
1513 Central Trust Tower
Cincinnati, OH 45202
COUNSEL FOR
PLAINTIFFS' CLASS

/S/_____
WILLIAM H. HAWKINS, 0003865
Frost & Jacobs
2500 PNC Center
201 E. 5th Street
Cincinnati, OH 45202
COUNSEL FOR DEFENDANTS

/S/_____
BRIAN WOLFMAN
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
COUNSEL FOR PUBLIC CITIZEN
AND COUNSEL FOR GARY
CRANE, ET AL.

/S/_____
JOHN F. NANGLE, JUDGE
UNITED STATES DISTRICT COURT

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al., *Plaintiffs-Appellees*,	)	
ELIZABETH W. RIDGEWAY, et al. Class Members-Appellants,	)	
	)	**Case No. 92-3973**
v.	)	
PFIZER, INC., et al., *Defendants-Appellees.*	)	

BRIEF FOR APPELLANTS

ON APPEAL FROM FINAL ORDER OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ENTERED ON AUGUST 19, 1992 AND JUDGMENT ENTERED ON SEPTEMBER 10, 1992

GARY GREEN
LARRY M. KELLER

MORTON B. WAPNER
Attorneys for Appellants

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
2700 ARAMARK TOWER
1101 MARKET STREET
PHILADELPHIA, PA 19107
(215) 574-0600

WAPNER NEWMAN & ASSOCIATES
115 SOUTH 21ST STREET
PHILADELPHIA, PA 19103-4433
(215) 569-0900

DATE: July 8, 1993

STATEMENT OF THE CASE

Appellants adopt by reference pages 4 through 19 of their Statement of Case submitted in their Brief filed in Case No. 92-4297.

ARGUMENT

I. THE COURT BELOW ABUSED ITS DISCRETION BY NOT GIVING PROPER CONSIDERATION TO THE IMPACT OF THE SETTLEMENT IN BOWLING ON THE CLASS IN *TAYLOR v. SHILEY*.

A. Because Appellants are the representative Plaintiffs in *Taylor v. Shiley* a pending state court class action, they have the duty to raise issues that impact on their case.

The background of the *Taylor* litigation has been discussed in papers submitted to this panel previously.[1] The law in Pennsylvania is that an action filed under Pa.R.Civ.P. 1701 is from the outset, a legally recognized class action, and all persons covered in the class definition are parties *until the court by order refuses to certify the class*.

Therefore under Pennsylvania law, Appellants appeared and participated at the Fairness Hearing as

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[1] Appellants respectfully refer the Court to pages 11-16 of *Brief for Appellants*, Case No. 92-4297 (consolidated with the instant appeal pursuant to this Court's Order of May 13, 1993); and pages 4-15 of *Appellants' Response to Appellees'-Defendants' Motion to Dismiss Appeal*, in Case No. 92-3973, filed March 17, 1993.

legitimate representatives of the class in *Taylor*. The district court received objections Appellants filed on behalf of the class in *Taylor v. Shiley* (R.250: Order at p. 1 referring to Appellants as the "Green firm"), and recognized Appellants were speaking for the class in *Taylor* (*Id.*, at p. 26, identification of the Taylor class litigation); *Id.* At p. 41 (discussion of lack of notice to the class in *Taylor*); *Id.*, pp. 42-43 (discussion of sub-class); *Id.* at p. 20 (discussion of proposal to settle class action in *Taylor*)). Furthermore, Appellants had a right and fiduciary duty to raise objections to the numerous procedures and proceedings which interfered with their maintaining the *Taylor* class action, and which deprived its members of a reasonable opportunity to chose between the benefits and risks of continued litigation in *Taylor*, or the settlement being offered in *Bowling*.

Having received Notice of the settlement in mid-January of 1992, and with May 22, 1992 as the deadline for class members in *Bowling* to postmark their opt-out designation, Appellants were precluded practically (and perhaps legally) from educating the class members in *Taylor* that there was an alternative to the proposed settlement in *Bowling*.[2]

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[2] A full discussion of the reasons why counsel for the class in *Taylor* could not contact the *Taylor* class members with enough time to help them decide whether to chose the *Bowling* settlement or to opt out of *Bowling* for the purpose of keeping alive their claims in the *Taylor* litigation appears in the *Amended Reply of Pennsylvania Class Objectors to Proponents' Submissions*, R.221, at pages 23-25; the reasons why counsel for the *Taylor* class could not have opted out the entire class in *Taylor* are discussed. *Id.* at p. 25-26; and the reasons why Appellants could not opt out their own claims without being derelict in their duties as class representatives are discussed, Id. at pp. 22-23.

Appellants filed in the district court an appendix of documents which demonstrated further that from the inception of the *Taylor* lawsuit, Pfizer simply engaged in a pattern of obduracy in discovery and in other dilatory tactics including prolonged motion practices. (R.143: Amended Objections at pp. 2-5 and Appendix at Exhibits "J" and "K"). While Appellants prevailed in almost every contested matter, Pfizer's lawyers obtained the desired result of prolonging and delaying the Taylor litigation for several years (Larry M. Keller, Aff. R.159: First Amended Objections, Exhibit "A"); it is ironic that the lower court found it meaningful that, "despite years of litigation, no court has ever awarded a judgment in favor of a plaintiff with a properly functioning heart valve." (R.250: Order at p. 46, emphasis in the original). Based on the record presented at the Fairness Hearing the district court had before it Pfizer-Shiley's successful efforts to use the court system in Pennsylvania to forestall notice to the *Taylor* class and a trial, even though (as will be discussed) Appellants in their *Taylor* class action had won the right to proceed with their case despite Defendants' motion to dismiss.

B. The approval of the settlement in *Bowling*, if affirmed, will have the legal effect of terminating the *Taylor* lawsuit.

The judgment entered by the district court approving the settlement in *Bowling* has the effect of binding Appellants as well as all of the class members in *Taylor* (except for the few who did opt out), and terminating the entire *Taylor* lawsuit since Appellants were required to "opt in" as a precondition to asserting objections. (R.44: Order; R.48: Order). Wright and Miller §1789, p.247; Restatement Second of Judgments 1981, §4.2, Comment a; *Hansberry v. Lee*, 361 U.S. 32 (1940): *International Prisoners Union v.*

Rizzo, 356 F.Supp. 806, 810 (E.D.Pa.1973). (R.250: Order at p. 33). Because the order approving Notice *required* Appellants to "opt-in" as a precondition to raising objections (R.44: Order; R.48: Order), and because the court denied the motion to enter an order allowing opt-ins subsequently to opt-out (R.123: Order), the Appellants faced a *Hobson's* choice: (a) opt in to raise objections and have their individual claims settled upon the approval of Bowling, with the result that the Taylor case would be dismissed in Pennsylvania due to *res judicata*; or (b) opt out and risk foregoing the right to make objections for the absent *Taylor* class members (and themselves), with the result that the *Taylor* class members, who did not know about its pendency as a class action, would be swept into *Bowling* as the only game in town, thus destroying the viability of *Taylor* as a class action in Pennsylvania.

The compulsion of opting-in as a condition of objecting, coupled with the dire consequences to the viability of the *Taylor* class action if Appellants opted out, effectively transformed this into the equivalent of a mandatory class action such as under Rule 23(b)(1). Here, for Appellants the voluntary nature of a Rule 23(b)(3) class was substantially undercut. Accordingly, the procedure employed by the court violated the Anti-injunction Act, 28 U.S.C. §2283 [prohibiting federal courts from enjoining state court proceedings]. *In re Temple*, 851 F.2d 1269 (11th Cir. 1988); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1183 (8th Cir. 1982).

The existence of the *Taylor* class action required the district court to intensify its scrutiny of the proposed *Bowling* class certification and settlement because the class in *Taylor* was comprised of 28% of the large valve implantees, which appeared to be no less than 2,241 and as many as 10,000 implantee-class members who overlapped with the 50,000 implantee class members in *Bowling*. (R.190: Appellants'

Brief, Exhibit "A", Wapner Affidavit paras. 5, 9; Gary Green at TR 6/9/92 at 94).

C. The lower Court failed to consider the fact that the Pennsylvania Court in *Taylor* had denied Pfizer-Shiley's motion to dismiss and therefore the Taylor class members could not be equated with other *Bowling* class members whose home-state Courts were not as hospitable.

The gravamen of the district court's error in its treatment of the *Taylor* case is that it gave no consideration to the order of the court in *Taylor* which denied Defendants' motion to dismiss and upheld a cause of action against Defendants for *Taylor* class members with working heart valves based on theories of intentional tort, fraud and breach of warranty. (Gary Green at TR 6/5/92 at p. 48; R.143: Appendix to Objections, Exhibit "C", order of Court in *Taylor*, 4/30/89; R.159: First Amended Objections, Exhibit "A", Keller Affidavit para. 5; R.143: Appendix to Objections of Plaintiffs and Class in *Taylor* at Exhibit "C"; Gary Green at TR 6/5/92 at p. 47). *In re School Asbestos Litigation*, 789 F.2d 996, 1007 (3d Cir. 1986) ["Federal courts are bound by the constraints of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1948), and the dictates of state law may not be buried under the vast expanse of a federal class action. The parties' rights under state substantive law must be respected, and if that is not possible in a class action, then that procedure may not be used"].

The district court embraced mistakenly *Brinkman v. Shiley, Inc.*, 732 F.Supp. 33 (M.D.Pa.1989), *aff'd.* 902 F.2d 1558 (3d Cir. 1989) (without opinion), as a dispositive ruling that class members had no cause of action against Pfizer-Shiley under Pennsylvania law. Nowhere in its Order approving the *Bowling* settlement did the district court even

acknowledge that a Pennsylvania court of competent jurisdiction, had rejected the Defendants' pattern - legal defenses, and had ruled in *Taylor* in favor of the class-wide causes of action. Rather, the district court looked far away from the favorable *law of the case* in *Taylor*, and latched on to *Brinkman*, stating: "The Green firm has failed to articulate any rational reason for arguing that this court should carve out a Pennsylvania sub-class. Given the decision in *Brinkman v. Shiley, Inc.*, 732 F.Supp. 33, 34, aff'd., 902 F.2d 1558 (3d Cir. 1989), the law in Pennsylvania looks no more favorable than in any other state."

But the ruling in the *Brinkman* diversity jurisdiction case was binding only the parties in that case, and has no effect on the state court overseeing the *Taylor* class action. More importantly, *Brinkman* did not address a cause of action based on Defendants' fraud on implantees, their doctors and the FDA, and did not discuss any of the Pennsylvania fraud cases; *Brinkman* was decided solely on information supplied in defendants' affidavits: and the plaintiff there had been denied all discovery. The difference between the rulings in *Brinkman* and *Taylor* are therefore, easy to justify. The *Taylor* court considered that Pfizer had launched into the stream of commerce its highly profitable heart valves (which they were forced to recall subsequently), with knowledge that these valves not only were more likely to malfunction than they reported deceitfully to the FDA and the medical community, but with cold-hearted knowledge also that persons in whom the valves were implanted would suffer severe emotional injury on learning that the valves implanted in their chests were much less reliable than they believed when the decisions were made to select the Defendants' valve instead of alternatives, and that Defendants' many "Dear Doctor" letters, where they repeatedly lied to the medical community about their valves, induced fraudulently, heart surgeons, as agents for the implantee class members, to

prescribe the valves. Thus, under Pennsylvania's tort of deceit, the class members in *Taylor* paid for and bought a heart valve which was represented as a product which had received legitimate FDA approval, when in fact, they had purchased a valve which never would have received FDA approval (and therefore, was recalled). (*See*, R.315: Appellants Rule 60(b) Motion, Exhibit "A", Expert Opinion of Professor Oscar Grey). The *Taylor* class Plaintiffs alleged a case for fraud which would allow them to recover not only the difference between the price of a properly approved FDA valve (what they thought they were buying) and one that was virtually worthless (because it would no have obtained FDA approval), as well as emotional distress damages.[3]

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[3] The *Taylor* class Plaintiffs had a wealth of authority from Pennsylvania Courts to support their position: *Bartanus v. Lis*, 480 A.2d 1178 (Pa.Super.1984) [cause of action for intentional infliction of emotional distress resulting from misrepresentation despite the lack of physical injury]; *Linker v. Custom-Belt Machinery, Inc.*, 594 F.Supp. 894 (E.D.Pa.1984) [cause of action allowed for intentional infliction of emotional distress based on false allegations in a lawsuit, notwithstanding the lack of pleaded physical injuries]; *Klein v. Council of Chem. Ass.*, 587 F.Supp. 213, 225 (E.D.Pa.1984) [dicta]; *Wishiewski v. Johns-Manville Corp.*, 759 F.2d 271, 275 (3d Cir. 1985) [intentional infliction of emotional injuries allowed in products liability case]; *Sinn v. Burd*, 404 A.2d 672 (Pa.1979) [emotional injury may be proven without showing of physical injuries]; *Hamil v. Bashline*, 392 A.2d 1280 (Pa.1978) [recognizing cause of action where wrongdoing of a party increased the risk of harm to plaintiff]; *Walsh v. Brody*, 286 A.2d 666 (Pa.Super.1971) [fear of developing a future injury, if traced to wrongdoing of a defendant is actionable]; *Scaife Co. v. Rockwell Standard Corp.*, 285 A.2d 451 (Pa.1971) [cause of action for fraud]; *Delahaney v. First Pa. Bank N.A.*, 464 A.2d 1243

What the court below misapprehended is that if it had denied approval of the *Bowling* settlement, the *Taylor* case would have proceeded as if *Bowling* had never been filed; and the state court in *Taylor* would follow its own ruling in deciding the claims of the *Taylor* class members. Quizzically, the district court's analysis was based on the flawed premise that somehow, the *Brinkman Court* was the equivalent of the Pennsylvania Supreme Court, or that it could otherwise step in and usurp authority over the *Taylor* case.

The lower court identified the "key factor" it must examine as being, "the strength of the Plaintiffs' case if the matter were fully litigated compared with the relief offered by the proposed settlement." (R.250: Order at p. 45). It opined that Appellants "vastly overstated the strength of the Plaintiff's case", noting that no Court as yet awarded a judgment to a plaintiff with a properly functioning valve; and the 27 Courts had not allowed causes of action, with only one court in California as the exception. However, since 22 of the 27 cases which influenced the Court were grants of defendants' motions to dismiss, the district court abused its discretion in not according weight to the *denial* of the motion to dismiss in *Taylor*; and in ignoring the unchallenged evidence that the victories obtained for the class in *Taylor* set its class members apart from other *Bowling* class members. (R.190: Brief at pp. 7-9; R.159, First Amended Objections, at Exhibit "A"; Keller Affidavit at para. 6; R.143: Appendix at Exhibit "C").

Thus, while the court did acknowledge that a cause of

(Pa.Super.1983) [cause of action for fraud by omission]. Pennsylvania has not retreated from its caselaw which created a hospitable forum for the *Taylor* litigation. *See, Hess v. Hess*, 580 A.2d 357 (Pa.Super. 1990) [fraudulent misrepresentations supports compensatory and punitive damages].

action was allowed under California law, citing Khan v. Shiley, 217 Cal. App. 3d 848, 255 Cal. Rptr. 106 (Cal.App.1990), it singled out, erroneously, the Khan case, to the exclusion of the Taylor case, as if Khan were the only court that had allowed an implantee to sue. (R.250: Order at pp. 8, 46).

The lower court stated as its ultimate conclusion, "Therefore this Court concludes that the proposed settlement provides fair compensation, because of the Plaintiff classes' slim chance of winning at trial and the high costs of litigating this matter." (R.250: Order at p. 54). While those of the *Bowling* class members who would be governed by the 27 judgments may have had "slim" chances of winning, clearly the class Appellants represent in *Taylor* did not fit into that group. The district court's conclusion is therefore flawed fatally, and is an abuse of discretion because it is not based on the facts or evidence.

The court should have found that none of the decisions in other cases impact the claims of the Taylor class, just as they will not affect the 363 Bowling opt-outs who are presently litigating their individual claims in California courts under the Khan decision (Klingsberg at TR 6/8/92 at 28); and did not deter Defendants from paying $31 million dollars to settle 330 separate cases of opt-outs who were represented by Bruce Finzen, Esquire. (R.315: Motion by PA Class Objectors for Expedited Consideration, etc., Exhibit "E"). The district court gave no consideration to the fact that in *Taylor* up to 10,000 class members had viable claims for recovering compensatory and punitive damages, while in *Bowling*, Defendants were able to settle all of their claims globally for a sum that was lower than their litigation damage exposure to the *Taylor* class alone. Indeed, if the *Taylor* class members recovered only half of the $100,000 per claim Defendants paid the Finzen clients, Defendants faced a $500 million exposure in *Taylor*.

II. THE LOWER COURT FOLLOWED IMPROPER PROCEDURES THAT FAILED TO PROTECT THE RIGHTS OF APPELLANTS AND OTHER CLASS MEMBERS AND WHICH TURNED THE RULE 23(e) FAIRNESS HEARING INTO A FARCE WHICH WAS NEITHER FAIR NOR A HEARING

A. The highly unusual circumstances of the settlement of this case required the Court to exercise scrutiny and to allow for an evidentiary record to be developed.

The Courts have articulated the potential for abuses by class counsel and have been meticulously careful to guard the rights of objectors to class settlements. *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942); *In re General Motors Corp. Eng. Int. Lit.*, 594 F.2d 1106 (7th Cir. 1979). Although the district court must consider the welfare of the class as a whole, it may not subordinate the stronger claims of an identifiable minority in a Rule 23(b)(3) class for the sake of a perceived common good. Similarly, settlements of Rule 23(b)(3) class actions are not exercises in democracy; the class counsel is not elected by the class - he is appointed by the court; the class members are not polled about their views before a settlement, but are given the right to voice an objection only after the fact; and the absent class members are not provided on a timely basis, sufficient information to express the kind of input during negotiations that clients normally get to tell their lawyers.

Moreover, while it is convenient for busy court to accept class counsel's arguments about the merits of the settlement compared to the expected results of litigation, the court must not forget that at a fairness hearing, there is no lawyer present who has a loyalty solely to the class members,

prompting him to point out the flaws in class counsel's rendition. Even objectors must be unreliable watchdogs who, as outsiders to the litigation, usually cannot be expected, without cooperation from the court, to marshall sufficient evidence to attack the settlement, especially in light of the short time between Notice and the fairness hearing.

In recognition of the realities of class action practice, numerous *canons* of class action administration have been articulated by appellate courts to guide trial courts in discharging their fiduciary duties to protect absent class members. Such canons, if merely parroted in a trial court's order approving a settlement, after a hearing where they had not been implemented in a pro-active manner, actually serve to legitimize and institutionalize the very abuses of class action practice which they were designed to detect and prevent. Unfortunately, such a deviation from proper procedure happened in this case.

Here the settlement agreement predated the class certification. The court below recited (but unfortunately, ignored manifestly) the appropriate rule that was designed to cover such situations: "**A court must apply a higher level of scrutiny in evaluating the fairness of the settlement.**" (Emphasis added). (R.250: Order at p. 16).

The critical circumstances about which the court below failed to develop an evidentiary record, but which deserved a "**higher level of scrutiny**", are summarized below.

1. Mr. Chesley's forum shopping.

On March 28, 1991, class counsel, Mr. Chesley filed a nationwide class action against Defendants on behalf of implantees with working *Shiley* heart valves in the United States District Court of Kentucky, *Wright v. Pfizer*, No. 91-58 (E.D.Ky). (R.338: Stipulation, Exhibit "C"). Twenty-two

days later, while the *Wright* case was still pending, on April 19, 1991, Mr. Chesley filed *Bowling*, a new nationwide class action in the Southern District of Ohio, on behalf of the same named class Plaintiffs in *Wright*; and it was identical to *Wright*, with the exception of the addition of several new Plaintiffs.

In a simple case, a court would look askance at such blatant forum shopping. In this case the lower court essentially put its stamp of approval on Mr. Chesley's forum shopping, even after Mr. Chesley demonstrated a lack of candor when confronted with the issue by Appellants, who complained that Mr. Chesley's forum shopping was evidence of inadequate representation under Rule 23(a)(4), or of collusion. Mr. Chesley offered the court two contradictory excuses. At a hearing before Magistrate Jack Sherman, Mr. Chesley stated that the Ohio Court was "a very good environment on the issue of emotional distress, having just come out of the *Fernald* case with the same Judge (Honorable S. Arthur Spiegel). And also the ability that we had to do, we started with a nationwide class and making it into a worldwide class." (Stanley Chesley at TR 5/13/92 at 24-25). However, after Appellants showed that Mr. Chesley had contradicted himself in a memorandum he had filed (R.161: Plaintiffs Memorandum in Support of Settlement Agreement at pp. 16-17), Mr. Chesley changed his tune, and at the Fairness Hearing, in response to a pointed question from the bench, his only excuse for having two identical class actions pending in closely neighboring federal courts, was that after the Kentucky case was filed, he was referred the cases of some residents of Ohio. (Stanley Chesley at TR 6/2/92 at 13; R.250: Order at p. 9 n.5). Since Defendants had a policy of never even negotiating with lawyers for emotional distress claimants (Klingsberg at TR 6/8/92 at 73), Mr. Chesley's forum shopping was consistent with the statements made by Pfizer's counsel, Kenneth Feinberg who admitted he was

brought into heart valve litigation by Pfizer in mid-1991 for the sole purpose of settling with Mr. Chesley (Kenneth Feinberg at TR 6/8/92 at 98), and that he had picked Mr. Chesley's case as the settlement vehicle in the heart valve case due to the **local judiciary**. (R.159: Amended Objectors, Exhibit "A", Keller Affidavit, para. 17). The inescapable inference is that the "local judiciary" in Kentucky did not meet with Mr. Feinberg's approval. The bottom line is, the record is barren of any basis to determine if the forum shopping was "harmless" or damaging to the integrity of the settlement, and in light of the inconsistent reasons provided by the proponents for their forum shopping, the district court erred in not itself scrutinizing or allowing Appellants to further develop this issue.

2. Mr. Chesley's almost instantaneous commencement of negotiations and the quick agreement to a global settlement.

Defendants filed their Answer to the Complaint on June 11, 1991 (R.4: Answer). Curiously, although in other cases defendants had filed motions to dismiss, (as they did in *Taylor*), here, Defendants were content to hold back their attack on Mr. Chesley's causes of action until after they made their settlement with him. After settlement negotiations bore fruit, Defendants filed motions for summary judgment as mere scenery in anticipation of the fairness hearing, knowing that their motions never had a chance of being ruled on. The entire course of the "litigation" can be described as perfunctory. Nine days after Defendants filed their answer to the Complaint, Mr. Chesley filed a short, boiler place motion for certification of a nationwide class, which included no factual support whatsoever. (R.5: Motion for Class Certification). On July 10, 1991, Judge Spiegel set down the motion to certify the class (R.6: Order), and it was on or

about July 15, a most nascent stage in the proceedings, that Mr. Feinberg told Mr. Chesley that Defendants were ready to negotiate the global settlement, and the formal settlement phase began. (Kenneth Feinberg at TR 6/8/92 at 98).[4]

Mr. Chesley undertook negotiations for the whole world, although he had no experienced in heart valve litigation (R.250: Order at p. 39) and had taken no merits discovery; nor had he mastered the written material pertaining to the problems with the heart valves, the fraud of Pfizer, the remedies that class members would require, or anything else

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[4] Judge Spiegel asked Mr. Chesley to state in his oral argument exactly what happened in his negotiations. (TR 6/8/92 at 27). In his response, Mr. Chesley said that in the settlement negotiation he dealt exclusively with Mr. Feinberg. (*Id.* at p. 30). Mr. Chesley stated that he began negotiating the settlement when "this case was set down for a hearing on a Motion for class certification" (*Id.* at p. 27) and "we requested jointly to put off the motion" (*Id.* at p. 28). (The docket entry for August 28, 1991 confirms that there was an agreed order amending the schedule for the class certification (R.8: Order)). Mr. Chesley was satisfied with the progress of the negotiations, and that a ruling on his motion "may have been prejudicial or detrimental to the settlement negotiations . . . so Defendants and I jointly requested a second vacating of the date for the hearing on the motion for class certification" (Stanley Chesley at TR 6/8/92 at 28). This occurred on September 4, 1991 (R.9: Agreed Amended Scheduling Order). During the negotiations there was an agreement to the concept of "making it a worldwide class" (*Id.* at p. 29). The time records Mr. Chesley submitted in connection with his fee request confirm that beginning in mid July, 1991 he was already negotiating the settlement with Mr. Feinberg. (R.276: Motion by Plaintiffs' Class Counsel and Special Counsel for Attorneys Fees and Expenses, etc., Exhibit "A" (time records of Stanley M. Chesley)).

that would inform him of the strength of Plaintiffs' case and what the settlement should include. (R.23: Memorandum by Plaintiff in Opposition to holding a hearing on the Motions for Summary Judgment during the 10/30/91 hearing and certification; R.24: Plaintiff's Opposition to Defendants' Motion for Summary Judgment, p. 6). Furthermore, although challenged on the point, Mr. Chesley refused to state whether he actually read any documents about Defendants' valves, stating vaguely only that such documents were **available** prior to his agreement to a worldwide settlement. (R.276: Motion by Plaintiff's Class Counsel and Special Counsel for Attorneys Fees and Expenses, Exhibit "A" (time records of Stanley M. Chesley); R. 161: Memorandum by Plaintiffs in Support of Settlement, pp. 25-26).

The almost instantaneous settlement negotiations had an obvious impact on the fervor of Mr. Chesley's prosecution of the class claim, lending credence to his remarks that he did not want to do anything "that may have been prejudicial or detrimental to the settlement negotiations or the possibility of settlement" (Stanley Chesley at TR 6/8/92 at 28). Mr. Chesley actually did nothing on the record (other than ask for extensions of time for the class action hearing date) until October of 1991 when he told the court he was not prepared to respond to the merits of the case. (R.23: Memorandum by Plaintiff in Opposition to holding a hearing, etc., *Id*; Docket entries, R.5-R.20). Further, Mr. Chesley had seen no evidence relating to the damages recovered by claimants in fracture cases, and he relied totally on the lawyer for his opponent, Mr. Feinberg, who told him generally about the ranges. (Stanley Chesley at TR 6/3/92 at 44).

Despite having undertaken no pretrial activity which would have equipped Mr. Chesley to make reasoned decision or "demands" deserving of his opponents' respect during the negotiations (which might have raised the settlement stakes), Messrs. Chesley and Feinberg announced the comprehensive

final settlement to the lower court at an in-chambers conference on November 19, 1991, where Mr. Feinberg stated that he wanted to have the settlement papers finalized by December 9, 1991, the date of the next Pfizer Board of Directors meeting; and Messrs. Chesley and Feinberg already had decided on the name of the "medical and Psychological Consultation Fund" (TR 11/19/91; Kenneth Feinberg, *Id.* at 39, 15; R.48: Agreement of Settlement and Compromise).[5]

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[5] A comparison of the terms of the settlement agreement which the court approved as the basis for notice to the class on 1/23/92 (R.48: Agreement of Settlement and Compromise) and the provisions of the settlement described to Judge Spiegel at the 11/19/91 conference demonstrates that all of the material negotiations had already been accomplished well before the November 19 conference. The chart below depicts the congruence:

Provision in 1/23 Agreement (R.48)	Transcript of discussion of the provision at 11/19/91 conference
Para. 2.2 - Class will be enlarged from nationwide to worldwide	TR 11/19/91 at 4
Para. 5.1 - Establishment of $75 million patient benefit fund, payable in installments: the first installment to be in the amount of $12.5 million	TR 11/19/ at 5
Para. 5.2.1, 5.4, 5.4.1 - The research funded by the patient benefit fund will be supervised by the Court	TR 11/19/91 at 6

Para. 5.2.3 - The supervisory panel will set guidelines for explant surgery	TR 11/19/91 at 6-7
Para. 5.3.3 - Shiley will pay for qualified explant surgery; there will be no cap because Pfizer will pay even if the patient benefit fund is depleted	TR 11/19/91 at 6
Para. 5.3.2 - Remainder of Patient Benefit Fund, not expended on Surgery can be devoted to explant surgery	TR 11/19/91 at 6
Para. 5 - A fracture compensation fund, with a $500,000 floor and a sliding scale	TR 11/19/91 at 7
Para. 7.4, 7.5, 7.6 - Future fracture claimant can accept scheduled amount, arbitration or litigation	TR 11/19/91 at 8
Para. 7.5 - Waiver of statutes of limitation and repose if future fracture claimant elects to accept scheduled amount or arbitration	TR 11/19/91 at 11

Defendants required that the class Mr. Chesley pleaded in the original complaint be more than doubled in magnitude. In obedience to Defendants' wishes, Mr. Chesley stipulated that the settlement class would be expanded elephantinely by adding spouses of implantees, as well as foreigners around the world with 70-degree valves which had a higher rate of fracture than the 60-degree valves implanted in Americans, but were not subject to FDA approval or

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Para. 6.1-6.5 - Establishment of medical and psychological consultation fund in the amount of $80 million to be divided equally amongst class members; if the number class members making claims against the funds exceeds 20,000, Shiley will augment the fund	TR 11/19/91 at 17
Para. 6.4.6 - Shiley will have 18 months after depositing $80 million to make additional payments to the medical and psychological consultation fund	TR 11/19/91 at 23
Para. 9.3 - Costs of notice to the class to be paid from the medical and psychological consultation fund	TR 11/19/91 at 24
Para. 9.1, 9.2 - Attorneys fees for class counsel shall be based upon the gross amounts of money and benefits received by the settlement class; and Shiley wil not oppose class counsel's application for fees	TR 11/19/91 at 24-25
Para. 11 - Pfizer will guarantee all of Shiley's obligations under the settlement agreement	TR 11/19/91 at 4-5

Defendants' "Dear Doctor" letters. Therefore, the expanded settlement class included members with materially different products; different risks; different fraud claims; different product liability claims; and different grounds for damages. None of Mr. Chesley's clients, Americans with 60-degree valves, could represent a class of foreigners with 70-degree valves. *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982). Defendants' motives for settling so quickly with Mr. Chesley, before he could even manufacture a credible pretense of having a grasp of the issues affecting the gargantuan settlement class, had to include Defendants' need to eliminate the real litigation risks they faced in *Taylor*. Moreover, the rapidity of Mr. Chesley's commencement of negotiations, despite the absence of any pretrial preparation, should have seemed suspicious to the lower court and probative of Appellants' contentions that there was justification to take evidence on whether this was a collusive settlement in which Pfizer-Shiley hand-picked Mr. Chesley as the means to eliminate, through the "back door", the threat of a huge verdict that might otherwise be recovered in the *Taylor* class action. Even in the absence of such a suspicion, the court was bound to investigate the impact of its class certification ruling on other litigation (Rule 23(b)(3)(B)).

It is beyond dispute that in a case s complex legally, factually and medico-scientifically, and giving Mr. Chesley the benefit of the doubt, his past experience negotiating other mass tort settlements could hardly be a substitute for a demonstration of Mr. Chesley's familiarity with the facts and issues of ***this*** litigation.

Nevertheless, the court refused categorically Appellants' repeated motions for Rule 23(a)(4) and (e) discovery, to examine Mr. Chesley at the hearing, and to otherwise make an evidentiary record. (TR 5/14/93; R.250: Order). This contradicted the requirements of the Sixth Circuit that an evidentiary record is required. *Cohen v.*

Young, 127 F.2d 721, 725-26 (6th Cir. 1942); *In re General Tire and Rubber Co. Sec.Lit.*, 726 F.2d 1075, 1085, n.6 (6th Cir. 1984); *Health v. Decourcy*, 992 F.2d 630 (6th Cir. 1993). Nonetheless, in its Order, the court inferred from naked rhetoric, and wishful thinking favorable to Mr. Chesley, that there was no collusion because, "in the relatively brief period prior to settlement, this matter was actively litigated. Both sides of the litigation were conducting discovery." (R.250: Order at p. 21). The court later contradicted its overly generous assessment about Mr. Chesley's discovery efforts, stating (R.250: Order at p. 43), "in the matter before the court, class counsel has admitted that only nominal discovery was taken before the settlement of the case." Yet, the Court still excused Mr. Chesley with the gratuitous finding of fact. "Of course, voluminous information about the Bjork-Shiley convexo/concave valve is available to the public" (R.250: Order at p. 43), which was likewise overly generous because the court's duty was determine not whether information was available to the public, but rather, whether Mr. Chesley studied and used the information prior to the settlement.

In Short, even a "lower level of scrutiny" would have required the district court to determine from *evidence* why Defendants chose to settle almost immediately, Mr. Chesley's 1991 copy-cat version of dozens of other lawsuits that were filed years before (and which were still pending), notwithstanding the fact that his meager litigation efforts posed no threat to them of either the certification of a class for litigation purposes *(See, In re Bendectin Products Liability Litigation*, 102 F.R.D. 239 (S.D.Ohio), *rev.*, 749 F.2d 300, 304 & n.10 (6th Cir. 1984), or in withstanding Defendants' motion summary judgment. (*See, Keath v. Shiley*, No. 91CV910 (N.D.Ohio Dec. 17, 1991)).

Instead of scrutinizing the issue, the district court legitimized the illusion of Mr. Chesley's "vigorous" litigation

effort. This reached an embarrassing level when the court, in searching for support, touted Mr. Chesley's opposition to Defendants' motions for summary judgment, and the fact that Mr. Chesley "convinced this court that it should hear the motion for class certification prior to considering the Defendants' dispositive motions." (R.250: Order at p. 21). But, Mr. Chesley "opposed" Defendants' motions by claiming that he had taken no merits discovery and needed more time. Significantly, as late as October 17, 1991, Mr. Chesley claimed he did not know enough facts about his case to even respond to Defendants' motions for summary judgment (R.23: Memorandum by Plaintiff in Opposition to holding a hearing etc.). Moreover, in light of the ruling in *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156 (1974) that class action motions should be heard before merits related motions, the gliding of such a routine matter as having a class action motion decided before a merits related motion, bespeaks of the court's untempered advocacy for Mr. Chesley. Indeed, the timing of the motions did not help the class because even if the court had certified a litigation class, Defendants' motions for summary judgment would still have to be decided; and if Defendants won the motions, (as was predicted by Mr. Chesley and Judge Spiegel) the whole class would have suffered the loss.

The issue of the speed of the settlement was clouded further by Mr. Chesley's intentionally vague and patently disingenuous utterances to the Court concerning his purported examination of documents during an alleged visit to the Shiley document depository (the place where Defendants maintained six million discovery documents). (R.161: Memorandum of Plaintiffs in Support of Settlement Agreement at p. 26; Stanley Chesley at TR 6/8/92 at 40-41. Appellants' counsel requested specifically that the Court ask Mr. Chesley of the timing of Mr. Chesley's examination of the documents (whether before or after the November 19,1991 conference),

and whether he actually read them; but the court refused, and no answers to these questions were provided at the hearing. (Gary Green at TR 6/8/91 at 101). After the Fairness Hearing, however, Mr. Chesley's attorney's fee application showed that it wasn't until May 13, 1992, that anyone from the Chesley law firm even visited Defendants' document depository. (R.276: Motion by Plaintiffs' Class Counsel for Attorneys Fees; Exhibit "A" (time records of Sherrell Hondorf)). This was a mere two weeks before the fairness hearing, and proof that Mr. Chesley's mentioning of the visit was calculated to deceive the court and the class about his preparedness to negotiate.

The court's sole consideration of the "timing" issue consisted of an unwarranted hypothetical in which it gave a benefit of the doubt to Mr. Chesley which was not consistent with "**a higher level of scrutiny.**" (R.250 at p. 23). The District Court stated:

> The Green firm's next argument is that the settlement was completely negotiated prior to the November 19, 1991, conference with the Court. We do not believe that this assertion is accurate; however, even assuming it to be true, we once again do not find that this is indicative of collusion. Merely because a settlement is negotiated in a month or two does not mean that the settlement is collusive. (R.250: Order at p. 23).

The court's scrutiny of the expansion of the settlement class upon Defendants' demand was similarly flawed. Rather than inquire about how Mr. Chesley purported to speak for a class of foreign members, of which no named Plaintiff was typical, the Court justified Mr. Chesley's action with the dismissive comment, "Merely because the parties settled a

greater dispute than Mr. Chesley originally envisioned does not indicate the parties engaged in collusion." (R.250: Order at p. 23).

The court gave Mr. Chesley another undeserved "benefit of the doubt" when it ignored the proof that Defendants dangled an "arbitrary" sum before Mr. Chesley, and told him the categories of claimants they wanted to buy off for that sum. Mr. Chesley admitted that the $80 million Medical and Psychological Consultation Fund was an arbitrary number . . . and this number came from Kenny (Feinberg). I don't have any independent means to verify the accuracy of those being the number of claimants coming in for this payment." (Stanley Chesley at TR 11/19/91 at 16). Judge Spiegel was unfazed that it made no difference to Mr. Chesley how much any class member might actually receive. This lapse by the court is most significant because **only 5% of the entire class are candidates for a reoperation**. (Stanley Chesley at TR 6/5/92 at 135). Therefore, **95%** of the class members will get no benefit from the research funded by the Patient Benefit Fund, and **their** meager benefit would be their pro rata share of the $80 million Medical and Psychological Consultation Fund - the one that Mr. Chesley acknowledged was established on an "arbitrary" basis, and which could give 5% of the class members, as their sole recovery, little more than $2,500. (Stanley Chesley at TR 11/19/91 at 33; R.250: Order at p. 67).

3. **Defendants made a quick settlement here with Mr. Chesley although since the beginning of heart valve litigation in 1984, Defendants have followed a strict policy of not even negotiating.**

Mr. Chesley made a remarkable presentation to the Court at the fairness hearing. He told the Court about the

"significant pattern" he saw when he decided to "get into the case." (Stanley Chesley at TR 6.2.92 at 45). He stated he knew that "no one has settled, per se, (heart valve) emotional distress litigation." (*Id.*). Mr. Chesley acknowledged the law firms represented in the audience that had "done good work, studied the case hard." (*Id.* at p. 47). These lawyers, according to Mr. Chesley, had been involved in the fraud issue, but Mr. Chesley's view was that "from the standpoint of reality, the fact that we weren't seeing hundreds of new cases being filed . . . led me to the conclusion that there wasn't much that (he) could to on in view of the established precedent." (*Id.* at p. 48). Mr. Chesley's firm had researched the law (R.276: Motion by Plaintiffs' Class Counsel and Special Counsel for Counsel Fees, Exhibit "A", time records J. Abaray; T. Goodman), and he therefore knew of the Defendants' success in obtaining judgment in non-fraud based causes of action, which coupled with Mr. Chesley's expressed lack of confidence in a fraud cause of action as something to "go on", should have demonstrated to the lower court the need to inquire whether Mr. Chesley ever intended to litigate; and if not, whether he filed his class action anyway because he knew in advance he would settle. Mr. Chesley's recitation of the reasons why he knew from the outset that all causes of action were doomed was further evidence consistent with a collusive settlement. This situation must be contrasted with the case where *after* a plaintiff's lawyer had filed suit, he discovered new evidence or there was an adverse change in the law which justified his own devaluation of the plaintiff's case. The implications of Mr. Chesley's violation of Rule 11, are inescapable. *Cf., Greenfield v. U.S. HealthCare, Inc.*, 146 F.R.D. 119 (E.D.Pa.1993).

The district court asked Mr. Chesley why he and Mr. Feinberg were able to work out a settlement while Defendants wouldn't talk settlement with the other lawyers. Mr. Chesley let the cat out of the bag, stating, "I believe that there was a

mutual ability of Feinberg and I to understand each other." (Stanley Chesley at TR 6/8/92 at 56). The court acknowledged Mr. Feinberg was given the task by Defendants to get litigation peace from his friend Mr. Chesley, stating,

> "Next, the Green firm points out that Mr. Feinberg only became involved with heart valve litigation to settle the *Bowling v. Pfizer* case with his 'friend', Mr. Chesley. Again, we do not find this surprising. Mr. Feinberg has a long history of involvement with class actions and mass torts, and this could draw upon his experience to try to globally resolve the **series of lawsuits with which Pfizer has been faced**." (R.250: Order at p. 23). (Emphasis added).

Bowling was not however, the consolidation of "a series of lawsuits" through multi-district litigation, or any other means; but, as observed in the court's statement above, the settlement was a calculated artifice to extinguish the Taylor class action and cases that would follow in its wake. The plain meaning of the court's order is that Rule 23(b)(3)(B) was designed to harness the power of a federal court to allow a defendant and a "friend", in a stipulated class and settlement, to undermine the Defendants' foes in other lawsuits. Clearly, this cannot be a tolerable result.

The court stated, "Mr. Chesley and Mr. Feinberg agree that they have a long relationship together stretching back to the *Agent Orange* litigation." (R.250: Order at p. 22). The court had before it also information about a pattern of quick settlements in earlier cases orchestrated by Mr. Chesley, where as class counsel, he catered to the needs of his erstwhile opponents. Appellants cited to the Court a June 26, 1992 *Wall Street Journal*, front page story which reported

interviews and quotations from well respected attorneys, and which stated: "questions are being raised about how well he [Chesley] truly serves his clients' interests. Scores of people have said in Court and in interviews that while Mr. Chesley's firm earns big fees from class-action settlements - $17 million in one case - he sometimes doesn't do all that well by the people he represents . . .", **"Chesley is a defendants' best friend** . . . he tends to attempt quick settlements that limit the liability of the defendant and provide big fees . . ." (emphasis added); "the process makes it tempting for class-action attorneys to forego years-long discovery and instead go for a quick settlement", "increasingly, other prominent lawyers in mass tort cases have come to perceive Mr. Chesley as too quick to try to settle cases for too little." *Wall Street Journal*, 6/26/92, T.M. Burton, staff reporter at pp. 1,5; quoted at length in R.221: Amended Reply by Appellants to Proponents' Submissions, pp. 110-112).[6]

The court thus failed to exercise its discretion to develop a record which would refute the inference that Mr. Feinberg was given the task to *"globally resolve the series of lawsuits"* because his friend Mr. Chesley had a reputation for helping *defendants* get *quick* global peace at the expense of the class members he purported to represent.

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[6] The lower court was not obliged to accept the *Wall Street Journal* as gospel, but it should be noted that it did rely on similar journalistic and hearsay sources to justify various aspects of its order. See, R.250: Order at p. 8 [citation by the Court to a *Wall Street Journal* article]; Id., p. 24 [law review]; Id., p. 25 [magazine article]; Id., pp. 53, 54 [*New Eng. J. Med*]; Id. p. 65 [*Lancet*]; Id., p. 65 [*Science and Technology*, magazine article].

4. The overall circumstances of the manner in which the case was litigated and settled were sufficient to require the lower Court to allow for an evidentiary hearing.

The lower court had virtually no familiarity with, or experience in this case; it decided no contested motions on the merits; and at the November 19, 1991 conference, the court's knowledge of the case was based on the *Wall Street Journal*. (TR 11/19/91 at 3). The only verbal contact that the court had with the parties prior to the November 19, 1991 conference was a scheduling conference on October 24, 1991, where the settlement was not discussed. (R.229: Motion of PA Class Objectors to Compel Proponents to Provide Discovery, etc., Exhibit "B", Defendants' Responses to Interrogatories, p. 4). Yet, the court refused to allow an evidentiary inquiry into the questionable matters raised earnestly and vigorously by Appellants concerning: (1) the forum shopping; (2) the quickness of the settlement; (3) the lack of any discovery or litigation by Mr. Chesley; (4) the purposeful hiding of the Taylor case from the Court by the proponents; (5) Mr. Chesley's admission that before he filed his complaint, in his opinion, the class had no cause of action; (6) the selection by Defendants of the latecomer, Mr. Chesley, to settle, notwithstanding Defendants' rigid policy of not settling any emotional distress cases; (7) the admissions by Mr. Feinberg that he was brought into the case to get a global settlement and that he immediately contacted his "friend" Mr. Chesley. *Cf., Cohen v. Young*, supra, 127 F.2d 725-26.

But if this were not enough, there were still other matters which obliged the court to oversee an evidentiary proceeding. For example, the court sought to solve the *mystery* of why Defendants settled with Mr. Chesley as opposed to all of the other attorneys litigating against it by

accepting, uncritically, Defendants' alibi that *Bowling*, as a nationwide class action, differed from all others, and, Defendants "seized the moment" to settle virtually all of the pending claims against it. (R.250: Order at p. 25). However, on the same page, the court referenced *Mehornay v. Shiley*, which was itself a **nationwide class action** filed in the Federal District Court for the Central District of California. *Mehornay* was identical to, and contemporaneous with *Bowling*. Assuming arguendo that Defendants were searching for a nationwide class action to "seize the moment", the court abused its discretion in not examining why Defendants declined to "seize the moment" in *Mehornay*, a case Defendants fought vigorously, and in which they obtained a voluntary dismissal. Perhaps the selection of Mr. Chesley's case for settlement can be found in the fact that Mehornay would apply California law; and the *Khan* case would have precluded Defendants from arguing, as they did in *Bowling*, that if the case were litigated, there would be no chance of the class surviving summary judgment. The court below should have been concerned about Defendants' forum shopping rather than being so willing to not look behind Defendants' self-serving, patently inadequate, and untested explanations.

An even more troubling issue is pregnant in the *Mehornay* case, and in another matter that was brought to the court's attention. The memorandum opinion in *Mehornay* (R.162: Memorandum by Defendants in Support of Approval of Settlement, Exhibits to Defendants' Memorandum, Exhibit "13") shows that in June 1991, less than a month before Mr. Chesley says he began his negotiations, the plaintiffs in *Mehornay* **voluntarily** dismissed their class action. Since Mehornay was governed by Khan, it is unlikely the Defendants could have won a litigated dismissal. Furthermore, their counsel, Robles and Gonzalez, were experienced "heart-valve litigators", with a large number of pending heart valve cases. The circumstances foster the

inference that defendants may have made a deal with Robles and Gonzalez to *settle* their clients' cases for substantial sums in exchange for dismissing voluntarily, their nationwide class action; and this preparing the stage in *Bowling* for Defendants to make their "*Bowling is a unique nationwide class*" excuse for their quick settlement with Mr. Chesley. If the court had conducted an evidentiary hearing to test the validity of Defendants' "excuse", the record might show proof to support it; or Defendants might have been exposed as colluders and schemers who helped undermine the salutary purposes of Rule 23.

Along the same lines, another lawyer who was prominent in heart valve litigation against defendants was Bruce Finzen, of Minneapolis. A short time after the November 19, 1991 conference, on January 13, 1992, Mr. Finzen's firm, through a local Cincinnati attorney, filed a motion to intervene on behalf of 183 persons (who claimed to be in the Bowling class) for the purpose of being heard on motions to certify the class. (R.39: Motion by Plaintiffs Kenneth Ackerman, et al. to Intervene). From the essence of the Finzen motion, and from the docket entries, which made it appear as if the motion to intervene was untimely (R.39: Motion to Intervene), it is likely that Mr. Finzen knew something about the proposed settlement that had been proposed to Judge Spiegel at the November 19, 1991 conference, and that he was putting pressure on Mr. Chesley and Defendants to first settle his cases, or face him at the fairness hearing. Ten days later, on January 23, 1992, Judge Speigel approved, without any inquiry, a stipulation withdrawing the Finzen motion to intervene. (R.40: Order). Remarkably, this was the same day on which the parties executed the formal *Bowling* Agreement of Settlement and Compromise, and Notice to the class was approved. (R.44: Order; R.48: Order). Under the court's duty as a fiduciary to the class, this unexplained withdrawal of the Finzen motion

to intervene should have caused the court to question what it was all about, since the air was rife with the odor of a secret settlement between Mr. Finzen's clients and Defendants. Although the court signed the stipulation withdrawing the Finzen motion without making any inquiry, it was later reported in the newspapers that, in what appears logically to have been the period contemporaneous with the Fairness Hearing, Mr. Finzen's firm was entering into a private settlement with Defendants for $31 million dollars in damages to settle 341 emotional distress cases. (R.315: Motion by PA Class Objectors raising matters under Rule 60(b)(2), (3) and (6), Exhibit "E"). Not surprising, the Finzen settlement was not revealed at the fairness hearing because of the court's restriction on inquiry and evidence.

By eliminating the *Mehornay* class action in California, and by apparently buying silence from Mr. Finzen's 341 clients, Defendants preserved the artificially choreographed proceedings before Judge Spiegel; and the court's self defined role of moderator, rather than Judge, deprived the class of the rigorous review of the settlement and its circumstances that they were due.

Finally, there is the issue of the court's rubber stamp approval of Mr. Chesley's expansion of his class to include spouses, foreigners and 70-degree implantees, even though none of the clients he represented or named in his complaint fit into any of these categories. Under the rule of Bowling, Mr. Chesley could freely claim the right to negotiate for non-clients, at a time when he could not even argue that they were hinted in the definitions of the class he put in either his complaint or class action motion. (R.1: Complaint; R.5: Motion for Class Certification). The court held that a lawyer can agree to settle claims for about twenty thousand people he neither represented nor included in his class definition. Under the logic of the court's ruling, did Mr. Chesley have to stop at expanding the class to valve implantees; could he

have included as well, people who were suing Pfizer for allegedly defective drugs it made?

The lower court's order changes the face of mass tort litigation; defendants facing a series of cases can achieve global peace by simply: (1) designing an off-the-shelf settlement; (2) locating a "friendly" plaintiff's lawyer who will create a shell by filing a Rule 23(b)(3) *settlement* class action; (3) shopping forums until they finally locate a court with an agreeable view; and (4) making the action an opt-out case to support the argument that if the class members do not like the settlement, they can avoid it, this eliminating any rigorous application of the need for Rule 23. The next step would be dispense with the charade of needing a class counsel to accomplish defendants' result (and save his requested $21 million in fees, R.276: Motion by Plaintiffs' Class Counsel and Special Counsel for Attorneys Fees and Expenses). Mr. Chesley's role here was simply to help the Defendants get the imprimatur of the court on their offer for global peace; but the rule of case or *controversy* was turned into a farce. Of course, this runs counter to accepted law. It should be emphasized that merely because a settlement has an opt-out provision, does not release a Court from enforcing all of the elements of Rule 23 vigilantly, *Ace Heating and Plumbing Company v. Crane Company*, 453 F.2d 30, 33 (3d Cir. 1971).

B. The Court had no basis to evaluate this settlement because class counsel withheld all information about the strengths of the case, and the Court refused to make a necessary choice of law ruling.

1. Mr. Chesley presented an unbalanced and distorted view of the case that covered only the weakness of the claims.

The class members did not choose or elect Mr. Chesley as class counsel; he owes his status to the court which appointed him. Unlike the settlement of a non-class action, the class members' input and acquiescence in the settlement were not considered to be material. When the court appointed class counsel, it vouched for him, ruling he would adequately protect the interests of the class. To preserve the integrity of the process, the court should have created an evidentiary record, especially here, where class members challenged the position asserted by class counsel, and where the substantial monetary damages sought in the Complaint for class members was sacrificed and traded for relatively nugatory class member recoveries. The court should have demanded that class counsel undergo a Rule 11 type of inquiry to prove, with evidence, that the allegations in the Complaint were valid; and then the Court should have put class counsel to the test of *proving* with evidence that was subjected to cross-examination, that the initial case, as described in his Complaint, deteriorated into a case which justified the compromises and diminished relief embodied in the settlement. In administering this *test*, the court should have required class counsel to *prove*, with evidence, the trial preparation he actually undertook (before he began his settlement negotiations), as well as counsels' other efforts to attempt to realize the promise of compensatory and punitive damages described in his Complaint, but later abandoned. If Mr. Chesley could not satisfy a Rule 11 inquiry concerning his case, and if he could not otherwise articulate the strengths of his case, the court should have appointed a guardian *ad litem* to speak for the class during the Fairness Hearing. As it was, the *settlement* had many spokespersons, while the class members were orphaned.

At the 23(e) hearing, the court was charged with evaluating and comparing the class claims from a theoretical litigation standpoint against the benefits obtained in the

settlement. It was in the self interest of Mr. Chesley to make a presentation to make a presentation at a Fairness Hearing which exaggerated the settlement's virtues, belittled the strengths of the litigation claims, and overstated the strengths of the defenses. He had no motivation to speak solely for the benefit of the absent class. In simultaneous class certification/settlement cases such as this, where there was never any real litigation proceedings to give the district court an independent basis to evaluate the strengths of the class claim, the court could not discharge its duties as a token fiduciary for the class. Rather, the court should have challenged class counsel, not because the court doubted the ethics, morality or integrity of Mr. Chesley, but rather, because class counsel's obvious conflict was that his requested fee of $21 million was dependent upon being an advocate for the settlement, not necessarily for the class members. (R.276: Motion by Plaintiffs' Class Counsel and Special Counsel for Attorneys Fees and Expenses).

Mr. Chesley undertook no merits discovery whatsoever, and at the Fairness Hearing, Mr. Chesley's accounting of the merits of the class claims was limited to reminding Judge Spiegel that Defendants had won 27 judgments in other courts; and denigrating the decision in *Khan* with the off-hand remarks that, despite the California Appellate Court's affirmance of a valid cause of action for fraud, "the fraud issues could not and would not succeed . . . because of bald face claims for fraud alone, in my opinion would not succeed and . . . if it did, it would be the subject of problems in the appellate court." (Stanley Chesley at TR 6/8/92 at 25).

The district court limited the presentations of the objectors. It did not allow them to offer or take testimony on any issue, and there was no opportunity for anyone to interrupt, with a contrary view, or to cross examine, the proponents' elaborate belittlement of the claims of the class.

When Appellants tried to discuss the real merits of the class' litigation claims, the court refused to hear it, repeatedly directing Appellants instead to articulate only specific reasons why the settlement was not fair. (TR 6/8/92 at 124, 125, 128, 130, 131, 133, 135, 137, 145, 155). The court, bereft of any input from Mr. Chesley about the strong points of the class' litigation case, was left to speculating that Defendants settled only to avoid the costs and annoyance of defending numerous lawsuits and bad publicity. It is telling that the court did not attribute as Defendants' motivation for settlement, any concern whatsoever for the threat posed by Mr. Chesley's case. (R.250: Order at p. 8).

What Mr. Chesley withheld from the Court concerning the strengths of the class' litigation claim is much too voluminous to recount here. Although Appellants have not completed their discovery in *Taylor*, there were some compelling facts that should have been mandatory to any balanced presentation; especially since in earlier heart valve cases against Defendants, an irrefutable body of "evidence" on the fraud claim was compiled. Defendants' fraud took several forms: they lied to the FDA repeatedly about the rate of failure of the valves, and fabricated phoney documents which reported falsely that Defendants were following "good manufacturing procedures." Defendants likewise lied in widely circulated "Dear Doctor" letters concerning false claims about the effectiveness of their valves compared to others on the market. (R.315: Motion by PA Class Objectors raising matters under Rule 60(b)(2), (3) and (6), pp. 8-18).

Mr. Chesley, told the Court nothing about the nature of Defendants' fraud, or the compelling evidence which proved it; nor did he address the issue of damages, except to predict "off-hand", that punitive damages were not recoverable at all, and that "there is nothing that a person can win compensatory damages on or any theory of wrongdoing." (Stanley Chesley at TR 6/8/92 at 21).

As a result of Mr. Chesley's strategy of discrediting his own litigation case, the record in this case is wholly deficient with respect to any reliable evaluation of the strength of Plaintiffs' case on the merits; *see, Plummer v. Chemical Bank*, 91 F.R.D. 434 (S.D.N.Y.1981) *Aff'd*, 668 F.2d 654 (2d Cir.1982).

Accordingly, although the lower court was fond of the "proof is in the eating test" (R.250: Order at p. 19), there was no standard to judge the "eating." Here, the court had no basis in the record to compare the strengths of the claims to the benefits of the settlement, because not one word was allowed to be uttered about the strengths. Based on Mr. Chesley's skewed and self-interested argument that the class had no legal claims, the court approved the settlement. However, Mr. Chesley had not put enough work into this case for the court to rely on his assessment, and after Mr. Chesley abrogated his role as the champion of the class claims, the court should have allowed Appellants to present the other side of the story.

2. The lower court failed to apply any choice of law.

The sixth Circuit in In re Bendictin Litigation, 857 F.2d 290 (6th Cir.1988) held that in a case such as this, Ohio's choice-of-laws rules would require the case to be litigated in accordance with the law of the state of manufacture. Pfizer, through its Shiley subsidiary, manufactured the heart valves in California, which was the principal place of business of Shiley; and all of defendants' activities with regard to the manufacture of the heart valve occurred in California. *Bendectin* required Judge Spiegel to apply California law when evaluating the strengths of the class claims, with the result that the controlling California decision would be *Khan v. Shiley, Inc.*, 217 Cal. App. 3d 484

(Cal.App. 1990); 266 Cal. Rptr. 106; [holding that there is a viable cause of action for fraud against defendants]. The district court however, held that under *Bendectin*, *Khan* was not the governing law, (R.250: Order at p. 48). Rather, seizing on a trivial difference between *Bowling* and *Bendectin*, to which the district court erroneously attached monumental importance, the court held that the law of the place of each implant would govern. (*Id.* at p. 49).

Another error of the lower court is found in its failure to acknowledge that Ohio law would not necessarily treat the fraud component of the case the same as the products liability component. *Macurdy v. Silov and Love*, PA, 894 F.2d 818 (6th Cir. 1990), stands for two pertinent propositions. First, a district court must consider how Ohio's choice of law rules would treat each separate cause of action. In *Macurdy*, the Court applied Ohio law to the Plaintiff's fraud claims, and Pennsylvania law to his contract claims. Secondly, Macurdy holds that in a fraud case, Ohio choice of law rules are derived from Sec. 6 and Sec. 148(1) of the *Restatement (Second) of Conflict of Laws*. Applying this *Restatement* test yields the identical result as in Bendectin; the place of implant would be of little significance, and the class would get the benefit of the cause of action validated in *Khan*. The district court erred therefore, when it evaluated the strengths of the class claims solely against inapposite rulings in the eleven jurisdictions where defendants obtained judgments.

The court erred further when it sought to belittle the *Khan* fraud cause of action. (R.250: Order at p. 50-51). Its discussion did not rely on any California decisions; instead, the court merely recited the five elements of fraud and added, (inappropriately, considering the evidence of Defendants' fraud) that it would be a "difficult tort to prove at trial because defendants' negligence is not sufficient." Therefore, the district court's estimation of a "little chance of recovery" as applied to the fraud claim, was unsupported. (R.250: Order

at pp. 52, 53).

On the other hand, assuming the *place of implant* as the correct choice of law, the court abused its discretion by not discussing the merits of the class claims based on that finding. For example, the Court noted that California members of the class would get the benefit of Khan (R.250: Order at p. 50); and it acknowledged that class members implanted in a few of the states would have their claims barred by statutes of repose. (R.250: Order at p. 51). How could both groups have the same chances of recovery? More importantly, the unresolvable conflict between the two Pennsylvania courts in *Brinkman* and *Taylor* was sufficient to demonstrate that the judgments defendants obtained in eleven jurisdictions were not reliable predictors of the courts in each jurisdiction where there was an implant.

The court's ruling trampled several tenets of Rule 23. First, by approving a uniform recovery based on the lowest common denominator, the court demonstrated that Mr. Chesley could not at one time represent those class members with viable claims for compensatory and punitive damages under decision such as *Khan* and *Taylor* (which collectively appeared to account for approximately forth percent of the class), and simultaneously represent persons in foreign countries or in states like Indiana which had a statute of repose. *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 166 (2d Cir. 1987) [plaintiffs with strong claims may not have them diluted by those with weak claims]; *In re Northern Dist. Of Cal., Dalkon Shield*, 693 F.2d 847, 850 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). Furthermore, the need to assess the claims under each applicable state law cannot be avoided by pointing to Rule 23. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985); *In re School Asbestos Litigation*, 789 F.2d at 1007. The fact that this was a settlement class did not eliminate the obligation of the court in passing on the fairness to assess the issues of

law which weigh heavily on the probability of the Plaintiffs' prevailing. *In re General Motors Corp. Eng. Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979). In another class action settlement case, Newman v. Stern, 464 F.2d 689, 692 (2d Cir. 1972), the court held that, "clear error with respect to the law governing a defendant's liability may warrant reversal of the trial court's approval of settlement."

C. The Court abused its discretion in preventing the creation of an evidentiary record on issues relevant to the Rule 23(e) hearing.

The court gave its "preliminary approval to the settlement when it held the November 19, 1991, conference with Messrs. Chesley and Feinberg. (TR 11/19/91). During that conference, which was the first time anyone discussed the settlement or negotiations with the court, (R.229: Motion by Objector Class to Compel, Exhibit "B"), the court expressed total unfamiliarity with the case; there was no discovery taken, and no substantive Rule 23 or fairness hearing issue was discussed. Remarkably, no information about the negotiations was asked for or provided either. The court had no basis to determine if the settlement was "tainted", or whether it was the product of an arms-length negotiation. The conference dwelled instead on an abstract description of the settlement terms, and a discussion of how best to exclude and frustrate the expected objections from lawyers for claimants who would end up in the class. (TR 11/19/91 at 33). The court had no knowledge of the case except what it had read in the *Wall Street Journal* (TR 11/19/91 at 2-4); the court was concerned about "getting the thing would up to the point you can write it up, make a motion with the court to approve the settlement." (*Id.* at 26-30); Mr. Feinberg warned the court, "lawyers out there will be seeking to round up opt-outs" and requested therefore, that the transcript of the

conference be sealed. (*Id.* at 40). Mr. Chesley warned the court that lawyers will be going around the country to solicit opt-outs. (*Id.* at 34). Everyone at the conference was concerned about protecting the settlement from attack, but the discussion about hindering lawyers and the sealing of the transcript were contrary to the fiduciary duty the court owed to the class since the court had no basis to determine whether the settlement was worthy of such preemptive protection.

This was a Rule 23(b)(3) class and Rule 23(b)(3)(B) required the Court to determine "the extent and nature of any litigation concerning the controversy already commenced by . . . members of the class." The lawyers knew about the *Taylor* class action (R.190: Brief at pp. 15-16; R.221: Amended Reply at p. 93). Indeed, Mr. Feinberg's firm participated in *Taylor*. However, the attorneys were silent, and therefore, the court's provisional certification, for this reason alone, was tainted. Moreover, it was consistent with Rule 23(b)(3)(B) and the fiduciary duty owed to the class that rather than be excluded totally from what was going on, the court should have insisted that lawyers in other cases against Defendants, at least be notified in advance of the final agreement that a settlement was imminent and it could affect other litigation. *In re Ivan Boesky Sec. Litig.*, 948 F.2d 1358 (2d Cir. 1991).

After the November 19, 1991 conference, the district court proceeded, erroneously, as if the burden of proof and persuasion were on the objectors, and as if the settlement was presumptively fair. Thus, despite numerous oral and written requests by Appellants for discovery and testimony of the hearing on the Rule 23(e) issues concerning negotiations, and Mr. Chesley's pretrial preparation, the Court generally limited the factual basis to the colloquy of counsel. Nevertheless, the cases hold that the burden is on the proponents, and an evidentiary record must be made especially where there is a simultaneous settlement and class

certification. *Plummer v. Chemical Bank*, 91 F.R.D. 434 (S.D.N.Y.1981) *aff'd* 668 F.2d (2d Cir. 1982); *see also, In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, n. 27, 213 (5th Cir. 1981) [in remanding the case for findings of fact and to consider the issue "anew with new evidentiary hearings"]; *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969)[Adequacy of representation and fairness of compromises are questions of fact for the district court]; *In re Traffic Executive Association - ER*, 627 F.2d 631 (2d Cir. 1980); *Saylor v. Bastedo*, 623 F.2d 230, 233 (2d Cir. 1980) [District Courts must explore facts sufficiently to make intelligent determinations concerning adequacy and fairness, and there must be some evidentiary foundation in support of the proposed settlement]; *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1987); *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 834-36 (9th Cir. 1976); *Patterson v. Newspaper and Mail Deliveries Union*, 384 F.Supp. 585, 588 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975) [the district court must make findings of fact and conclusions of law whenever the propriety of a settlement is in dispute]; *In re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1125 (7th Cir. 1979) [in approving settlements that are disputed, the court should make findings of fact and conclusions that are not based simply on the arguments and recommendations of counsel].

Appellants had justification to seek discovery about the negotiations and Mr. Chesley's preparedness to settle because adequacy of representation is a Constitutional right Mr. Chesley owed to the class at all times, including after he settled his case. *Shutts, supra*, 472 U.S. at 812. However, the district court refused discovery and denied Appellants' motions to compel answers to interrogatories, and depositions on grounds that Appellants failed to provide "independent evidence of collusion." (R.250: Order at p. 6) citing *Mars Steel Corp. v. Continental Illinois Nat'l Bank and Trust*, 834

F.2d 677, 684 (7th Cir. 1987), and the fact that Magistrate Sherman had held a hearing where no such evidence was produced. (Id. at 5). However, the hearing before Magistrate Sherman was limited to argument. Moreover, on a crucial point, both Mr. Helmer, private counsel for Mr. Chesley, and Mr. Klingsberg, counsel for Defendants, misrepresented to the Magistrate the falsehoods that "[T]he settlement negotiations, Your Honor, to some extent took place actually in Judge Spielgel's presence in this case" (Helmer at TR 5/13/92 at 7) and, "There couldn't be hanky-pank in the negotiations in this case because Mr. Chesley and the defendants went to Judge Spiegel at the outset of settlement negotiations and Judge Spiegel said it was all right for Mr. Chesley to negotiate this on behalf of this putative class. His Honor was kept informed of the negotiations while they progressed. And so how could they have been hanky pank in a settlement negotiation which was done under the very nose of Judge Spiegel?" (Klingsberg TR 5/13/93 at 46).

These statements were made at a time when Appellants had no basis to contradict them. However, Mr. Klingsberg filed an answer to Appellants interrogatories which confirmed that Judge Spiegel did not discuss the settlement until the November 19, 1991 conference, when it already had been fully negotiated. (R.229: Motion for PA Class Objectors to Compel Proponents to provide discovery, etc., Exhibit "B"). If the proponents had been truthful, perhaps Magistrate Sherman would have allowed discovery.[7]

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[7] It is ironic, under the circumstances, that Judge Spiegel put a burden on Appellants to show *evidence* of collusion since he placed no evidentiary burden whatsoever on the proponents. (R.250: Order at 21). While the court did not ask proponents to support anything with "evidence", and accepted their statements as true, even after it recognized that they had strong self

Mars Steel did not concern discovery per se because objectors complained only that there should have been an evidentiary hearing before notice went out to the class, 834 F.2d at 684. Moreover, in *Mars Steel*, the court did hold an **evidentiary** proceeding at the fairness hearing, before the settlement was approved. (*Id.*). Therefore, in *Mars Steel*, the objectors did get at least one opportunity to challenge and cross-examine the proponents, and to make an evidentiary record - all of which was made impossible in this case. Moreover, in *Mars Steel*, the court indicated that an inference of collusion which would justify discovery from the proponents could be found in the "terms or timing or other circumstances [of the settlement]." 834 F.2d at 684.

Clearly, all of the suspicious circumstances in Bowling which prompted the questions from the Bench, would support the allowance of discovery. Indeed, the lower court was itself fixated with the issue of collusion, as it should have been; but it did not go beyond asking questions. The court here did indeed pose numerous questions to the proponents about the matters discussed previously in this brief, and those areas were ripe for a factual evidentiary record. (TR 6/5/92, at 49-50; TR 6/8/92, at 27-54). However, no answers to these questions were provided, thus requiring the court to substitute gratuitously, *benefits of the doubt*, which favored the

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interest in obtaining the court's approval (R.250: Order at p. 16), by contrast, the court demanded evidence and proof of contentions made by Appellants: (R.250: Order at p. 22) [no documentation of Feinberg-Chesley behavior in prior case]; *Id.* at 25, [no way of deciphering vigor with which Pfizer defended other lawsuits]; *Id.* at 26 [Green firm has not informed court of mass tort experience]; *Id.* 39 [no evidence exists that named representatives have antagonistic interests to class]; *Id.* at 56 [no evidence to support assertion about Defendants' ongoing research].

proponents.

In *In re General Tire and Rubber Co. Sec. Lit.*, 726 F.2d 1075, 1085, n. 6 (6th Cir. 1984), this Court held in a class action settlement matter, "In deciding whether the district erred in denying that discovery, we must inquire whether or not the district court had before it sufficient facts intelligently to approve the settlement offer." (Emphasis added). Here, as demonstrated, there were virtually no "**facts**", as required by this Court. Similarly, in *In RE Armsted Industries Litigation* 521 A.2d 11014, 1108 (Del. Ch. 1986), the court held proper, questions posed to the attorneys for settling parties about settlement negotiations, including why settlement was pursued in one case and not another. The court said this was needed to establish the absence of collusion. Likewise, the circumstances in the instant case can be equated with *In Re General Motors Corp. Engine Lit., supra*, 594 F.2d at 1124, where the Seventh Circuit reversed a trial court for refusing discovery, noting that the "conduct of the negotiations was relevant to the fairness of the settlement", and such an inquiry "is also consistent with the letter and spirit of Rule 408 of the Federal Rules of Evidence" because participants who negotiate settlements of class actions are aware that Rule 23(e) will result in an inquiry into the conduct of negotiations.

There can be no substitute for a factual record. In *Malchman v. Davis*, 706 F.2d 428 (2d Cir. 1983), the court held that a factual record must be made about "the negotiating process examined in light of the experience of counsel, the vigor with which the case was prosecuted and the collusion that may have marred the negotiations themselves". 706 F.2d at 433. *Malchman, supra*, states also that the deference afforded a district court is less when the settlement has been negotiated before the class was certified. Id, 706 F.2d at 434; and the district court must demonstrate "it had before it sufficient material to evaluate the settlement". Id, (citations

omitted); and "to survive appellate review, the district court must show it has explored comprehensively all relevant factors". Id.

The Supreme Court in *Protective Committee for Independent Stockholders of TMT Traller Ferry Inc. v. Anderson*, 390 US 414, 434 (1968) likewise expressed criticism of: "mere boiler plate approval [of a settlement] phrased in appropriate language but unsupported by evaluation of the **facts** or analysis of the law" (emphasis added). The Supreme Court in *Protective Committee* required *evidence* to support the conclusions of the approving court, and held "to make an informed judgment, however, the court needs **facts** not allegations." 390 U.S. at 434 (emphasis added). The Supreme Court emphasized the requirement of a factual record stating, "the record is devoid of **facts** which would have permitted a seasoned judgment that the claims of actions should be settled in this fashion". 390 US at 440-41. Not surprisingly, the case was remanded for an evidentiary hearing. Id. *See also, In Re Amsted Industrial Litigation, supra*, 521 A.2d 118 [discovery to test good faith of class representative with regard to negotiations needed to protect the class]; *See also, U.S. EX REL McCoy v. California Medical Review*, 133 F.R.D. 143, 144 (N.D. Cal. 1990). [If court precluded discovery to objector which would shed light on the settlement and enlighten the court, it would invite collusion]; *Greenfield v. Village Industries, Inc.* 483 F.2d 824, 833 (3d Cir. 1973); *Girsh v. Jepson* 521 F.2d 153, 157 (3d Cir. 1975) [district court must allow objectors timely discovery and the right to cross examine witnesses].

Finally, and perhaps most compelling, by not allowing an evidentiary record, the court below violated the requirements of the Sixth Circuit, as stated in *Cohen v. Young* 127 F.2d 721, 725, 726 (6th Cir. 1942) [objectors must be allowed to make an evidentiary record and it is an abuse of discretion for district court to approve a settlement without

receiving and considering evidence by which the court's discretion should be guided or controlled]. *Cohen v. Young* is the grandfather of all the representative - class settlement cases. *Cohen* holds that a district court cannot justify the approval of a settlement solely upon the recommendation of the attorneys, and that the notice requirement for the absent class members is to allow the court the benefit of their views as well as "evidence proffered by them" 127 F.2d at 725. *Cohen* holds further that a district court's exercise of discretion in approving a settlement must be based on evidence, and the "court was bound to hear the legal testimony concerning the compromise . . . the court could not protect the interests of . . . [the absent class] relying solely upon the advice of attorneys" 127 F.2d at 726. More recently, in Health v. Decourcy, 992 F.2d 630, 635 (6th Cir. 1993), the Sixth Circuit reversed the modification of a consent decree because "the district court relied on unverified statements . . . The district court also relied on unauthenticated materials and oral argument by counsel . . . The district court failed to conduct a 'complete hearing' by not allowing any evidence."

III. THE NOTICE VIOLATED THE RIGHTS OF THE CLASS MEMBERS APPELLANTS REPRESENT IN *TAYLOR*.

The Notice in this case was a combination of that which is *required* by Rule 23(c)(2) and the Constitution, as well as the discretionary notice set forth in 23(e). There are two defects in the Notice. First, the order approving the Notice (R.44: Order; R.48: Order) required the class members to opt out before the fairness hearing and lose their standing to object, or stay in the class as a condition of filing their objections. It was an abuse of discretion to require that class members opt in to a settlement before a final

determination of its propriety was made. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). Moreover, Appellants had to make this election before the proponents filed their papers in support of the settlement. Since this was an "extremely complex settlement" (R.250: Order at p. 10) which was thrust upon class members at the same time that they were advised of the existence of the case, it was a denial of their rights to due process. *Robinson v. Union Carbide Corp.*, 544
F.2d 1258, 1265 (5th Cir. 1977).[8]

The second flaw in the Notice is that it failed to advise the *Taylor* class members who overlapped with the Bowling class, of the existence of *Taylor*. This was especially important because the *Taylor* case, although a valid class action under Pennsylvania law, had not reached the notification stage. The rule of law concerning the notice to the *Taylor* class is not found in Rule 23, *per se*; it is found in the Constitution. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) [notice must be sufficiently informative to satisfy due process]. In *Shutts, supra*, the Supreme Court equated notice in an opt out class action with

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[8] Judge Spiegel is incorrect in his memory of whether and when he claims to have relaxed the election requirements described in the Notice. (R.250: Order at p. 28). The Notice as a court order. There was a conference before the Fairness Hearing, held on May 26, 1992 where the court discussed, but did not enter an order concerning whether opt-outs could object. But since the date for opting out of the settlement was "postmarked as of May 22, 1991", and since the court under no circumstances allowed opt-ins to later opt out, the court's after-the-fact and informal allowance of objections form opt-outs was of no benefit to Appellants.

the giving of consent by non-resident class member to the exercise of jurisdiction by the Court; the failure to opt out establishes the consent. "In *Shutts*, the Court did not remove . . . [the requirement of a substantial relationship between a state and an individual over whom jurisdiction is asserted] from class Plaintiffs. Its reasoning, instead was based upon the inference of consent from class members' failure to opt out." Miller and Crump, *Multistate Class Actions After Shutts*, 96 Yale L.J. 1, Nov. 1986 at p. 16.

The sole basis of jurisdiction over class members in this case is diversity. Therefore, the district court is treated as an Ohio State Court for purposes of analyzing its substantial relationships with the class members it seeks to bind. *International Shoe Co. v. Washington*, 325 U.S. 310, 316 (1945). Accordingly, cases which interpret the notice requirements under Rule 23, but also concern class actions brought under a federal statute (conferring jurisdiction on a federal court) have no application here.

The *Taylor* class members must be shown to have made a voluntary and knowing consent to the jurisdiction of the court in Ohio, with sufficient awareness of the relevant circumstances and likely consequences. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Memphis Light Gas and Water Div. v. Craft*, 436 U.S. 1, 14-16 (1978). Because the information about the *Taylor* litigation as an alternative to the Bowling settlement was not provided, the Notice was defective from a due process standpoint. By ignoring Rule 23(b)(3)(B), the court exercised no discretion in the first instance since it approved the Notice without even asking about the existence of other cases. The court abused its discretion again when it refused Appellants' request to create a subclass which would match the *Taylor* class for purposes of a renotification.

CONCLUSION

For the foregoing reasons, the district court abused its discretion, and the Order and Judgment certifying the class and approving the settlement should be reversed.

Respectfully submitted,

/S/_____
Gary Green
Larry M. Keller
Morton B. Wapner
Attorneys for Movants

OF COUNSEL:
SIDKOFF, PINCUS & GREEN, P.C.
2700 ARAMARK TOWER
1101 MARKET STREET
PHILADELPHIA, PA 19107
(215) 574-0600

WAPNER NEWMAN & ASSOCIATES
115 SOUTH 21ST STREET
PHILADELPHIA, PA 19103-4433
(215) 569-0900

DATE: July 8, 1995

CERTIFICATION OF SERVICE

I, Larry M. Keller, Esq., hereby certify that I served a true and correct copy of the foregoing document upon the following on today's date by U.S. First Class Mail:

Stanley M. Chesley, Esq.
WAITE, SCHNEIDER, BAYLESS & CHESLEY
Suite 1513 Central Trust Tower
Fourth and Vine Streets
Cincinnati, OH 45202

David Klingsberg, Esq.
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, NY 10022

James R. Adams, Esq.
FROST & JACOBS
Central Trust Tower, Suite 2500
201 East 5th Street
Cincinnati, OH 45202

James T. Capretz, Esq.
5000 Birch Street
West Tower, Suite 2500
Newport Beach, CA 92660

James T. Capretz, Esq., Special Counsel
c/o Capretz & Radcliffe
5000 Birch Street
West Tower, Suite 2500
Newport Beach, CA 92660

Lewis J. Saul, Esq.
5335 Wisconsin Avenue, NW
Suite 820
Washington, DC 20015

John T. Johnson, Esq.
Johnson & Dylewski
Two Houston Center
909 Fannin, Suite 3220
Houston, TX 77010

Brian Wolfman, Esq.
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009

Charles Wolfson, Esq.
Wolfson Law Offices
MacMillan Court
Cnr Barrenjoey Road & Avalon Pde, Suite 8
Avalon NSW 2107, Australia

Brian R. Magana, Esq.
Magana, Cathcart & McCarthy
Suite 810 Gateway West Bldg
1801 Avenue of the Stars
Los Angeles, CA 90067

Kenneth Kasdan, Esq.
Kasdan, Simonds, Peterson, McIntyre, Epstein & Martin
2091 Business Center Drive, #200
Irvine, CA 92715-1156

/S/_____
Larry M. Keller

Date: August 18, 1995

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al., *Plaintiffs*,	)	
	)	**Case No. C-1-91-256**
v.	)	**Order of Transfer**
PFIZER, INC., et al., *Defendants*.	)	

The above-captioned case is hereby transferred from the docket of the Honorable S. Arthur Spiegel to the docket of The Honorable John F. Nangle, United States Senior District Judge for the Eastern District of Missouri, sitting by designation in the United States District Court for the Southern District of Ohio, on the issue of the award of attorneys' fees and costs only. It should be noted that any appeal from Judge Nangle's ruling will be made to the United States Court of Appeals for the Sixth Circuit.

SO ORDERED.

Dated: July 27, 1995

/S/_____
S. Arthur Spiegel
United States Senior
District Judge

/S/_____
John F. Nangle
United States Senior
District Judge

APPENDIX L

DESIGNATION OF A SENIOR UNITED STATES DISTRICT JUDGE FOR SERVICE IN ANOTHER CIRCUIT

FILED
KENNETH MURRAY
CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT OHIO
EAST. DIV. COLUMBUS

The Chief Judge of the United States Court of Appeals for the Sixth Circuit having certified that there is a necessity for the designation and assignment of a judge from another circuit to perform judicial duties in the United States District Court for the Southern District of Ohio and the

HONORABLE JOHN F. NANGLE

A Senior United States District Judge for the Eastern District of Missouri, in the Eighth Circuit, having consented to perform judicial duties in the United States District Court for the Southern District of Ohio, in the matter of *Bowling et al v. Pfizer, Inc., et al.*, No. C-1-91-256

NOW, THEREFORE pursuant to the authority vested in me by Title 28, United States Code, section 294(d), I do hereby designate and assign the Honorable John F. Nangle to perform judicial duties in the United States District Court for the Southern District of Ohio for the stated purpose and for such time as needed in advance to prepare and to issue

necessary orders, or thereafter as required to complete unfinished business.

/S/_____
William H. Rehnquist
Chief Justice of The United States

Washington, D.C.: July 19, 1995

RECEIVED
JULY 27, 1995
OFFICE OF THE
CIRCUIT EXECUTIVE

A true copy WILLIAM K. SUTER
/S/_____

APPENDIX M

INTERCIRCUIT ASSIGNMENT OF A UNITED STATES JUDGE

CERTIFICATE OF NEED

Pursuant to the provision of Chapter 13, Title 28, United States Code, I certify that a need exists for the assignment of a United States judge from another circuit or special court to perform judicial duties in the following court:

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

From: _____ to: _____

* To hear the case of *Bowling, et al. v. Pfizer, Inc., et al.*
No. C-1-91-256

/S/_____
G.S. Merritt
Chief Judge
Sixth Circuit

Date: June 23, 1995

Please mail original form to:

Honorable Stanley S. Harris
Chairman, Committee on Intercircuit Assignments
United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

If time is limited, please transmit an advance copy by FAX to: (202) 273-0011.

APPENDIX N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al., *Plaintiffs*,	)	
	)	**Case No. C-1-91-256**
v.	)	**Order Lifting Stay Denying Motions to Intervene and Authorizing Distribution of Funds**
PFIZER, INC., et al., *Defendants*.	)	

This matter is before the court on:

I. the Motion by the Pennsylvania Class objectors for an Order to Alter or Amend Order Dated April 14, 1994 (doc. 371), the Plaintiff Class's Response (doc. 378), the Defendants' Response (doc. 380), and the Motion of the Pennsylvania Class Objectors for Ruling on Pending Motion (417), to which the Plaintiff Class (doc. 422), as well as the Defendants (doc. 423) have responded;

II. The Motion by Class Members Gary Crane *et al.* to

Intervene (doc. 373), the Plaintiff Class's Response (doc. 373) and the Defendants' Response (doc. 384); and the Motion of Class Members Gary Crane *et al.* For Discovery and Briefing Schedule on Attorney's Fees (376).

III. In addition the Special Masters/Trustees have submitted the Notice of Mailing to Class Members and for Publication (doc. 397).

I. PENNSYLVANIA CLASS OBJECTORS' MOTIONS TO INTERVENE

Previously, the Pennsylvania Class Objectors ("PCO" have filed a Motion to Intervene (doc. 265), which we denied by our Order of April 5, 1994 (doc. 363). The PCO also filed a Motion to Reconsider (doc. 315), which we denied by Order of April 12, 1994 (doc. 368). In addition the PCO has taken numerous appeals to the Sixth Circuit, all of which have been dismissed. Finally, the United States Supreme Court has denied *certiorari* to the PCO.

Certiorari has been denied, all appeals have been exhausted and the judgment of this court approving the settlement is final. The parties in co-operation with the Special Masters/Trustees are moving toward the implementation of the settlement and the class members will soon begin to enjoy the benefits of their lawsuit. The PCO has delayed the implementation of the settlement for over two years with their series of appeals. The PCO now has moved this Court to amend our Order of April 5, 1994, in which we denied the PCO's Motion to Intervene. In the alternative, the PCO request that we grant their renewed Motion to Intervene and/or grant relief from judgment under Rule 60(b) or to grant permission for the filing of an amended 60(b) motion. The admitted aim of the PCO's motions is to be allowed to intervene in order to file another round of appeals, which

would again significantly delay the implementation of the settlement. The PCO has had an opportunity to make their objections to the settlement and those objections have been carefully considered. It is now for the implementation of the settlement for the benefit of the Plaintiffs' Class. The tens of thousands of class members who are waiting for the settlement's benefits have waited long enough. Furthermore, our understanding of the Sixth Circuit's rulings in the PCO's previous appeals indicates that even if we allowed the PCO to intervene at this point, their opportunity for appeal has long past.

A. TIMELINESS OF THE PCO'S MOTIONS

"An application for permissive or intervention of right must be timely." *Michigan Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981). If untimely, intervention must be denied. *Id.* Timeliness in a matter within the sound discretion of the district court. *Id.* The Sixth Circuit has articulated the factors "which are particularly probative in determining whether intervention is timely." *Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 582 (6th Cir. 1982). Those factors are:

> 1) the purpose for which intervention is sought; 2) the length of time preceding the application for intervention during which the proposed intervenor knew or reasonably should have known of his interest in the case; 3) the prejudice to the original parties due to the proposed intervenor's failure after he knew of or reasonably should have known of his interest in the case to apply promptly for intervention; 4) the existence of unusual circumstances militating against or in favor of

intervention; and 5) the point to which the suit has progressed.

Id. (citing *Retarded Citizens*, 657 F.2d at 105). We will examine these in order.

1. The Purpose for Intervention

The PCO's stated purpose in seeking intervention is to pursue a course of further appeals, aimed at overturing this Court's approval of the settlement in this case. The PCO in their Motion for the Court to Rule on Pending Motion have made an impassioned plea that justice requires that their objections to class certifications and to the settlement be revisited. They argue further that unless we grant their motion to intervene they will be deprived of their opportunity to be heard. However, the record of this case indicates that this Court has afforded the PCO ample opportunity to be heard and has in turn carefully considered and responded to each objection they have raised.

The PCO has had the opportunity to raise their arguments before this Court in numerous documents. In additon, Mr. Green spoke at length at the fairness hearing. In our Order Finding the Proposed Settlement to be Fair, we devoted forty pages to objections raised by the PCO. Document 250 at 18-58, August 19, 1992. Finally, we note that the Plaintiffs' Class, in their Memorandum in Opposition to the PCO's motion to amend cites us to the record in the PCO's original case in Pennsylvania in which counsel for the PCO applauded the *Bowling* settlement, explaining why the PCO had not opted out of this case, as they were entitled to under the settlement. The Plaintiffs' Class reports that counsel for the PCO told Judge Lord:

[A]lthough our clients were offered the

> opportunity to opt [out] of the Bowling case, they elected to stay in the case and obtain the benefits from the *Bowling* settlement . . . . One of our clients has been identified as a candidate for a re-operation which means that her Pfizer heart valve would be removed and a new heart valve implanted. Under the *Bowling* settlement, this client could expect to receive substantial compensation and to thus be able to afford the procedure. Accordingly, the prospect of waiting many, many years for a resolution of the *Taylor* case, compared to the relief provided by a prompt implementation of the *Bowling* settlement was something that the client considered. The other client who has a working valve is also in a fragile state of health.

Memorandum of Plaintiffs' Class at 4, n.4, Document 422, (citing a hearing in *Taylor v. Shiley* held on December 29, 1992).

The PCO's stated purpose in seeking to intervene is to attack the fairness of the settlement. But the PCO has had ample opportunity to do this before this Court. The Sixth Circuit has clearly delineated our responsibility in this situation in the *Stotts* case. There the Court of Appeals was reviewing a situation very similar to that now before us, where individuals sought to intervene to object to a consent decree that the district court had already approved:

> [T]he court afforded the proposed intervenors an opportunity to air their objections to the 1980 Decree. This is all that the court was required to do given its determination that the 1980 Decree was reasonable.

Stotts, 679 F.2d at 584 (emphasis added). This court has given the PCO ample opportunity to "air their objections," and has considered and responded to each.

2. The Delay in Moving for Intervention

The PCO argues that they moved to intervene as soon as they realized that their failure to intervene would present a problem in their attempts to appeal the judgment of this Court. Essentially, the PCO's complaint is with the Court of Appeals. At the level of this district court, the PCO has been given every opportunity to present their case, even at this late date. Therefore, we are not inclined to grant this motion to intervene over two years after our approval of the settlement in order to provide the PCO with an opportunity to further delay its implementation.

3. Prejudice to the Parties

The Third factor to be considered in determining whether a motion to intervene is timely is "the prejudice to the original parties due to the proposed intervenor's failure after he knew of or reasonably should have known of his interest in the case to apply promptly for intervention." *Stotts*, 679 F.2d at 582. By far the most compelling reason to deny the PCO the opportunity to intervene is to immediately begin the implementation of the settlement. The parties have the right to the compensation provided under the settlement. The research provided for should begin at once. Below, we authorize the first distribution from the Consultation Fund. The Special Masters/Trustees intend to disburse these funds in the next month. To postpone the benefits of the settlement for another round of appeals would indeed be prejudicial to the members of the class.

In our order of April 5, 1994, which the PCO now

request that we alter, we denied the PCO's motion to Intervene

> because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class . . . .

Order at 1, Document 363. The reasoning that we applied in that order becomes more urgent with every passing day.

4. Unusual Circumstances

The fourth factor for timeliness provided by the Sixth Circuit is "the existence of unusual circumstances militating against or in favor of intervention." *Stotts*, 679 F.2d at 582. One of the most creative aspects of this settlement is the open ended nature of the Defendants' liability. For example the Defendants will remain liable for all fractures, regardless of the number. Another example is the continuing duty to replenish the Patient Benefit Fund to insure permanent availability of replacement surgeries. Finally, in several circumstances, the settlement offers Plaintiffs the opportunity to bring separate suit if he or she is not satisfied with the benefits provided under the settlement.

Besides the unusual flexibility of the settlement itself, this Court retains continuing jurisdiction over the operation of the settlement. The Court has appointed able and conscientious Special Masters/Trustees who also keep a watchful eye on the fairness of the settlement's implementation, and who regularly report to the Court. In addition the Special Masters/Trustees have assembled a Supervisory Panel composed of some of the most respected physicians in the field and a Foreign Fracture Panel of

comparable expertise. Therefore, even if some of the PCO's wildly speculative predictions of problems with implementation of the settlement should surface, we are confident that the Court, in its continuing control, with the help and guidance of the competent professionals now assembled is prepared to address them.

5. The Point to Which the Suit Has Progressed

After considering timeliness in terms of the previous four factors the Sixth Circuit's directs us to consider "the point at which the suit has progressed." *Michigan Ass'n for Retarded Citizens*, 657 F.2d at 105. It is now over three years since the beginning of this litigation. The PCO first appeared in this case nearly two and one half years ago. The settlement has been approved for over two years. Notice has been sent to the class members. Objections and opt-outs have been completed. The Supervisory and Foreign Fracture Panels have been appointed and have been working for months. The first distribution from the Supervisory fund is only weeks away. The interest of justice would not be served by intervention at this time.

B. LEGAL INFIRMITIES IN PCO'S ARGUMENTS

1. Objecting and Appearing Does Not Make the PCO a Party

The PCO argues that intervention would merely formalize its status as an intervenor, because they appeared and objected at the fairness hearing. The Green firm argued to the Court of Appeals:

> [F]or all purposes, the court below treated appellants as parties in this case. Appellants .

> . . vigorously participated extensively in the Fairness Hearings themselves . . . . The doctrine of *de facto* intervention is clearly applicable to appellants . . . .

Appellants' Response to Appellees'-Defendants' Motion to Dismiss Appeal at 29. However, the Sixth Circuit rejected that argument, stating that "[b]ecause the appellants are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." *Bowling v. Pfizer, Inc.*, No. 92-3973 slip op. At 1 (6th Cir. Dec. 21, 1993), (citing *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 568-79 (8th Cir. 1992); *Walker v. City of Mesquite*, 858 F.2d 10071, 1073-75 (5th Cir. 1988)). The PCO argued unsuccessfully to the Sixth Circuit that because this Court allowed the PCO to participate to the fullest extent possible, the PCO should be considered parties for the purposes of appeal. Ironically, now the PCO returns to this Court charging that their participation in the fairness hearing was inadequate.

2. Intervention Will Not Accomplish the PCO's Goals

The PCO seeks to intervene so that it can once again attempt to appeal from our approval of the settlement. But as the Defendants point out, intervention will not give the PCO the right to appeal. The time for appeal of that judgment has now passed. *See Jenkins v. State of Missouri*, 967 F.2d 1245, 1248 (8th Cir.) (Where the district court granted the motion to intervene, and the court of appeals held that "granting the group intervenor status cannot breathe life into rights already foregone"). The PCO argues without authority that we can grant them intervenor status which relates back to the time which they filed their first appeal. Even if we were

inclined to so rule, it is extremely hopeful speculation on the part of the PCO that the court of appeals would allow them to revive their appeal. The Sixth Circuits own language in one of the PCO's prior appeals would seem to rule out the effectiveness of "retroactive" intervention.

> The lack of intervenor status at the time of the appeal suggests that the appellants were not "parties" when they brought the notice of appeal.

Bowling v. Pfizer, Inc., No. 94-3519 (6th Cir. August 8, 1994) (citing Fed. R. App. P. 3(c); *Jenkins v. Missouri*, 967 F.2d 1245 (8th Cir.) *cert. denied*, 113 S. Ct. 811 (1992)).

C. THE PCO'S OTHER ARGUMENTS

Although we believe that the reasoning set forth above is determinative of the PCO's motion now before us, we feel compelled to address briefly some of the more inflammatory accusations which the PCO makes in the Motion of the PA Class Objectors for Expedited Consideration and Raising Matters Under Fed. R. Civ. Pro. 60(b)(2)(3) and (6) (doc. 315). The PCO declares that we should amend our judgment in light of new evidence, discovered after our ruling that the settlement is fair. The PCO claims that their "new evidence" proves that a fraud was perpetrated on this Court by the misrepresentations of class counsel and counsel for the Defendants. In fact, we have heard many of these arguments before from the PCO, other are based on the PCO continued misunderstanding of the details of the settlement, and some are based on "new evidence" which in fact was brought forward by the parties and considered by the Court in the process of approving the settlement.

Running throughout the PCO arguments is the theme

that Class Counsel and the Defendants colluded to fashion a settlement which was favorable to the Defendants. This objection was considered at length in our August 19, 1992 order approving the settlement. In that order, we studied the PCO's allegations carefully and discovered that the PCO provided no real evidence to support these allegations. However, admitting that proof of collusion was difficult, we focused on the settlement itself to discover if it in fact was fair. In doing so we followed the guidance of the United States Court of Appeals for the Fifth Circuit, which has stated:

> It is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable, and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

In re Corrugated Antitrust Litigation, 643 F.2d 195, 212 (5th Cir.) *cert. denied*, 456 U.S. 998 (1982). Having examined the settlement and found it fair, we find no basis for the PCO's bold allegations of collusion and fraud on the Court, particularly in the absence of any real evidence presented by the PCO.

One of the PCO's specific arguments is that the Court in approving the settlement failed to consider the strength of the class's fraud claims. Principally, this claim is based on the opinion of Professor Oscar Gray that the Plaintiffs' Class's fraud claim was stronger than was represented to the

Court. In addition, the PCO claims that Class Counsel John T. Johnson and others withheld information concerning the Defendants' alleged fraud. However, the Court was well aware of Class Counsel Johnson's discoveries. The relative strength of the Plaintiffs' Class's fraud claim was considered at length by the Court. We acknowledge that the issue is far from certain, and is an appropriate subject for legal argument. However, we are satisfied that the relative strengths and weaknesses of the Plaintiffs' Class's fraud claims were weighed by the parties in reaching the settlement, and by the Court in approving it.

Another major accusation of the PCO is that the Court was deceived concerning the Defendants' prior medical research and in particular the Beaumont study. Here the PCO relies on articles appearing in the *New York Times* in the fall of 1992, shortly after the settlement was approved. Those articles, as characterized by the PCO, claim that the Defendants had perfected a method for detecting defective valves, using sophisticated X-ray techniques. The articles claim that the screening process would be quite costly and the PCO argues that they are significantly more expensive than is provided for in the settlement.

By the PCO's own admission "the Court, *sui sponte*, raised the issue of the stories relating to Beaumont that had appeared in *The New York Times* and the *Wall Street Journal* . . . ." Motion of the PCO at 34, Document 315. The Court was satisfied by the response of the parties concerning the Beaumont studies. Counsel for the Class indicated that the Beaumont study was part of the Defendants' ongoing research toward identifying defective valves, that the techniques developed there did not yet constitute a practical technique for detecting defective valves, and that that research would be handed over to the independent Supervisory Panel, one of whose duties is to direct research under the settlement. Having met with the now empaneled Supervisory Panel, the

Court is satisfied that this independent group of top-flight medical experts will examine the Beaumont research and make the appropriate reports to the Court.

We further note that many decisions remain for this Court, the Special Master/Trustees and the expert panels, before the settlement can be fully implemented. Significant among them are the nature and amount of diagnostic testing which will be provided. This in turn is dependent upon the research and recommendations of the Supervisory Panel. Such basic issues as what constitutes a fracture and who should be eligible for replacement surgery are yet to be decided. The Court is most anxious to embark upon this stage of the case and to begin to see the settlement actually benefit the class members. For this very practical reason, in addition to the legal requirements discussed above, the Court must deny the PCO's motions.

II. GARY CRANE *ET AL.*'S MOTIONS

Class members Gary Crane, Gene Randall, and amicus curiae Public Citizen have moved for a discovery and briefing schedule on attorney's fees. Previously, we have stayed all matters concerning attorney's fees pending the decision of the United States Supreme Court in regard to *certiorari*. Since the Supreme Court has now declined to grant *certiorari*, we hereby lift that stay. Parties may conduct discovery in regard to attorney's fees until June 1, 1995.

Class members Gary Crane, Gene Randall, and Gerard Benadik have also moved to intervene. These class members seek to intervene in respect to "the attorney's fees issue," and "any other post-settlement matter upon which there might be an appealable issue." At the same time these movants admit that they "have no outstanding objections to the settlement other than the fees issues."

We have already given the movants' counsel, who

appeared as *amicus curiae* at the fairness hearings, the right to appear with respect to attorney's fees. They are entitled to participate in the briefing of the attorney's fees issue and to make appearances at any hearings the Court may conduct in regard to such matters. However, for the same reason stated above in regard to the Pennsylvania Class Objectors, we decline to grant their Motion to Intervene.

III. INITIAL DISTRIBUTION OF CONSULTATION FUND

The Special Masters/Trustees have submitted for approval a Notice for Mailing to Class Members and for Publication. We hereby approve that notice. The Special Masters/Trustees have proposed that the first of two distributions from the Consultation Fund be made in December, 1994. We hereby approve that first distribution. In making that distribution, we order the Special Masters/Trustees to hold in reserve at least twenty-five percent (25%) of the Consultation Fund for the purposes of future payment of attorney's fees and expenses. We do this out of an abundance of caution. This percentage does not represent the Court's future intentions in regard to attorney's fees. That decision will be made at a later date after the Court has had the opportunity to review the briefs on the subject of attorney's fees, the filing of which we have authorized above. Furthermore, the fact that we are reserving this amount from the Consultation Fund does not represent a decision to preclude the use of monies from the other funds for the purpose of attorney's fees.

CONCLUSION

Accordingly, for good cause shown and in the interest of justice, the Motion by the Pennsylvania Class Objectors for

an Order to Alter or Amend Order Dated April 14, 1994 (doc. 371) is DENIED. The Motion by Class Members Gary Crane *et al.* to Intervene (doc. 373) is likewise DENIED. The Motion of Class Members Gary Crane *et al.* for Discovery and Briefing Schedule on Attorney's Fees (376) is GRANTED as described above. Finally, the Special Masters/Trustees' Notice of Mailing to Class Members and for Publication (doc. 397) is APPROVED and the Special Masters/Trustees' request to partially distribute monies from the Consultation Fund is APPROVED with the limitations set forth above.

SO ORDERED.

/S/_____
S. Arthur Spiegel
United States District Judge

Dated: November 23, 1994

APPENDIX O

FILED
MAR 1 1993
KENNETH J. MURPHY Clerk
U.S. DISTRICT COURT
CINCINNATI, OHIO

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL. Plaintiffs, v. PFIZER, INC., ET AL., Defendants.	CASE NO. 91-CV-256 S. ARTHUR SPIEGEL, JUDGE

MOTION OF THE PA CLASS OBJECTORS FOR EXPEDITED CONSIDERATION AND RAISING MATTERS UNDER FED.R.CIV.PRO. 60(B)(2), (3) AND (6)

GARY GREEN
LARRY M. KELLER
DEAN B. LIPSON

MORTON B. WAPNER
Attorneys for PA Class Objectors

SIDKOFF,PINCUS, & GREEN, P.C.
530 Walnut Street, 12th Floor
Philadelphia, PA 19106

(215) 574-0600

WAPNER, NEWMAN & ASSOCIATES
15 South 21st Street
Philadelphia, PA 19103-4433

(215) 569-0900

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. 91-CV-256
	)	
	)	S. ARTHUR SPIEGEL,
Plaintiffs,	)	JUDGE
	)	
v.	)	
	)	
PFIZER, INC., ET AL.,	)	
	)	
Defendants.	)	

_____/

ORDER

AND NOW, this day of 1993, upon consideration of the *Motion of the PA Class Objectors for Expedited Consideration and Raising Matters Under Fed.R.Civ.Pro. 60(b)(2), (3) and (6)*, it is hereby ORDERED:

(a) The matter shall be expedited: and

(b) Opposing Answers and Memoranda shall be filed on or before

_____

BY THE COURT:

_____

J.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. 91-CV-256
	)	
	)	S. ARTHUR SPIEGEL,
Plaintiffs,	)	JUDGE
	)	
v.	)	
	)	
PFIZER, INC., ET AL.,	)	
	)	
Defendants.	)	

ORDER

AND NOW, this day of 1993, upon consideration of the *Motion of the PA Class Objectors for Expedited Consideration and Raising Matters Under Fed.R.Civ.Pro. 60(b)(2), (3) and (6)*, it is hereby ORDERED:

(a) If the case were remanded from the Court of Appeals, this Court would grant the motion to the extent that it seeks to permit Movants to take limited discovery and to present evidence concerning the substantive issues raised in the Motion; and

(b) The issues raised in the Motion, if established, would be likely to cause this Court to modify the Judgment of this Court entered on September 9, 1992; and

(c) Movants are authorized to report this Order to the Court of Appeals and to request a remand of the case.

BY THE COURT:

_____

J.

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. 91-CV-256
	)	
	)	S. ARTHUR SPIEGEL,
Plaintiffs,	)	JUDGE
	)	
v.	)	**MOTION OF THE PA**
	)	**CLASS OBJECTORS**
PFIZER, INC., ET AL.,	)	**FOR EXPEDITED**
	)	**CONSIDERATION**
Defendants.	)	**AND RAISING**
_____/		**MATTERS UNDER**
		FED.R.CIV.PRO.
		60(b)(2), (3) AND (6)

Elizabeth W. Ridgeway, Rosemary Grunsby and Fred Grunsby ("PA Class Objectors" or "Movants"), by their counsel, hereby move the Court pursuant to Fed.R.Civ.Pro. 60(b)(2), (3) and (6) to grant them relief from the Order and judgment entered September 6, 1992, and request that the Court enter an Order, 91) which would allow this motion to receive expedited consideration and a prompt ruling; (2) which would state that if this case were remanded, the Court would open the record for consideration of the matters raised, thereby authorizing Movants to ask the Court of Appeals for the Sixth Circuit for a remand of the case to allow this Court to consider and rule on the issues raised herein; (3) which would, after a remand, allow depositions, document production and other discovery to be pursued, and thereafter, an evidentiary hearing relating to the matters raised herein; 94) which would, after a remand, vacate the Order and judgment entered September 6, 1992; and (5) which would

provide whatever other relief is just and appropriate. In support of the motion, the PA Class Objectors aver as follows:

Overview and request for expedited consideration.

1. This Motion brings to the attention of the Court certain information discovered *after* the Court entered its Order and Judgment approving the settlement of the class action. This newly discovered information leads to the conclusion that the proponents of the settlement counsel for defendants and class counsel) *intentionally* withheld from this Court meaningful and crucial facts within their control which, if they had been disclosed, would have certainly caused this Court to alter the nature of the Fairness Hearing proceedings, and to reach a different result.

2. Two appeals have been filed by Movants and are pending. Appellants' briefs are now due on March 22, 1993. Therefore, Movants ask that this Court determine the preliminary part of this Motion before that March 22, 1993 briefing deadline.

3. As discussed more fully below, this Motion has a direct impact on the appellate proceedings, and therefore, this Court has both jurisdiction and the responsibility to rule on this Motion. Notwithstanding the pending appeals, only this Court has jurisdiction to decide a Rule 60(b) motion, and the Court of Appeals won't have such jurisdiction until this Court rules on this 60(b) motion or (declines to rule).

4. If this Court should grant the preliminary part of this Motion, Movants would then be authorized to ask the Sixth Circuit to suspend the appeals, and the case would be remanded to this Court.

5. If this Court should enter an order denying the Motion, or if it declines to consider it, Movants request that this Court enter such a negative order within enough time for

it to be included with the Sixth Circuit's consideration of the related issues currently on appeal, ideally, before the March 22, 1993 briefing deadline.

6. Accordingly, Movants request expedited consideration of the preliminary portion of this Motion, which asks the Court merely to state in an order that if the case were remanded from the Sixth Circuit, this Court would grant the Rule 60(b) motion, at least as far as it seeks to reopen the record so that this Court could *consider* the newly raised issues identified by this Motion.

B. Discussion of related proceedings.

1. In an in-chambers conference held on December 28, 1992, this Court was advised that Movants and the Respondents were participating in a mediation process pursuant to the Sixth Circuit's Rule 18, and that it appeared as if the parties might be able to reach an amicable resolution.

2. However, as the mediation process progressed, and as new events unfolded, the Movants realized that they were not in agreement, and therefore, the mediation process did not result in an amicable resolution. Accordingly, the parties have returned to the *status quo ante*.

3. An original version of this Motion was prepared, and was served on counsel for the class, Stanley M. Chesley, Esquire and counsel for defendants, David Klingsberg, Esquire in early November 1992. However, before Movants could file it with the Court, the parties became involved in the mandatory mediation process pursuant to Rule 18 of the Sixth Circuit's Rules. At the request and direction of the Sixth Circuit's Chief Conference Attorney, Robert Rack, Esquire, a moratorium was imposed on the filing of hostile motions, including the instant Motion, to allow the mediation process to run its course. The mediation process ended finally, without success, on February 19, 1993.

4. While the matter has been on appeal, certain attorneys who have participated in this case as "special counsel" and defendants' attorneys have been engaged in discovery and depositions in cases of opt-outs which are scheduled for trial in California's state courts. According to reports from counsel for the opt-outs, the pre-trial proceedings in those cases appear to have included deposition testimony from persons affiliated with defendants' research of diagnostic techniques at the Beaumont Hospital.[1]

5. The Beaumont diagnostic technique-related depositions and discovery material from the California state court proceedings should be made a part of the record in this case, and the defendants should be ordered to release any confidentiality orders they imposed or obtained, and to produce it for this Court to review.

C. Procedural issues - This Court is obliged to rule on this Motion, notwithstanding the notice of appeal.

1. In an Order dated September 9, 1992, the Court, *inter alia*, entered judgment approving the settlement and certifying a class in the above-captioned matter.

2. Two notices of appeal were filed by Movants and one notice of appeal was filed by Public Citizen. While

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[1] The defendants' research of diagnostic techniques which would benefit class members appears to have reached positive findings in 1991, at the William Beaumont Hospital in Royal Oak, Michigan. This research was financed and supervised by defendants. As used in this Motion, references to "Beaumont" and the "Beaumont diagnostic technique" refer to the diagnostic research program undertaken by defendants at the Beaumont Hospital. This topic is discussed at length herein in Section F, *infra*.

Public Citizen has since discontinued its appeal, Movants' appeals are still pending and are being prosecuted.

3. In a Memorandum dated November 9, 1992, this Court declined to rule on any pending application or motion until the Court of Appeals remands the case or directs this Court to decide the pending applications or motions.

4. This Court reached its November 9, 1992 decision to not decide the pending motions and applications "because of the uncertainty of its continuing jurisdiction in the case for any purpose."

5. The instant motion is filed under Fed.R.Civ.Pro. 60(b)(2) (3) and (6).

6. Under controlling authority of the Sixth Circuit Court of Appeals, as seen in cases such as *First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 843, 345-467 (6th Cir. 1976), the procedure for filing a motion under Rule 60(b) *after* a notice of appeal had already been filed, is as follows:

> "When an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in this court for a remand of the case in order that the District Court may grant the motion for new trial."

7. The Sixth Circuit stated also in *Hirsch, supra*, 535 F.2d at 346:

> "In accordance with this procedure, we think that the party seeking to file a Rule 60(b)

> motion (NBD) should have filed that motion in the district court. If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court. Otherwise, the appeal will be considered in regular course.

8. Therefore, notwithstanding this Court's "uncertainty of its continuing jurisdiction" over the matters mentioned in the Court's November 9, 1992 Memorandum and Order, it is clear under *Hirsch, supra*, that this Court definitely does have jurisdiction to decide this motion.

9. It is likewise clear under *Hirsch, supra* (and other authority discussed in the attached memorandum) that this Court does not have the discretion to avoid making a ruling on this Rule 60(b) motion (and thus this Motion cannot be treated the same as the earlier filed motions and applications covered by the November 9, 1992 Memorandum and Order); rather, this Court appears to be obliged to decide this Motion and to exercise its discretion under Rule 60(b) in the context of such a decision.

10. Under the authority of *Hirsch*, Movants therefore ask this Court to state in an Order that if the case were remanded, it would grant the preliminary portion of this Motion,[2] and thus enable Movants to file a request in the

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[2] As used herein, the phrase "preliminary portion of this Motion" refers to the part of this 60(b) motion that merely asks the Court to open the record and explore and consider the issues and new matter raised by this Motion. To obtain a remand, it is not necessary that the Court make any decision on the ultimate merit of the issues. By way of example, the Court could state that if the case were remanded, it would take evidence on the issues

Court of Appeals to remand; or in the alternative, if this Court is not disposed to grant this Motion, Movants request that this Court enter an Order to that effect (*see, Hirsch, supra*, 535 F.2d at 346).

D. Because of the nature of the inquiry conducted by this Court at the Fairness Hearing, where no testimony, cross-examination or other sworn evidence was required or allowed, counsel for the proponents had a duty to the Court and the class to be candid, truthful and forthcoming. After-discovered evidence has now proven that this duty was violated.

1. During the Fairness Hearing, on June 5, 8-9, 1992, and July 22, 1992, the proponents of the settlement (Class Counsel, defendants' counsel and their allies) presented arguments to the Court in the form of written and oral presentations, some of which purported to answer inquiries posed by the Court on crucial issues that the Court was required to determine before it could approve the settlement and/or certify the class.

2. The proponents advanced arguments which sought to convince the Court that the relief provided in the settlement was adequate when compared to what the class members could expect in litigation, and that the relief in the settlement responded to a specific set of supposed factual circumstances, which the proponents represented to the Court were extant (referred to as "SUPPOSED FACTS").

3. Because the Court refused to require the

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pertaining to the Beaumont diagnostic techniques discussed below in Section F. Such a statement by this Court would justify a remand.

proponents to introduce competent evidence on any of the disputed issues, and did not allow the PA Class Objectors to put on the record any sworn testimony or other competent evidence, it appears that in the absence of any evidence, the Court accepted as true the proponents' *arguments* in lieu of proof of the said SUPPOSED FACTS, and that the Court therefore relied on the candor and integrity of the proponents' *arguments* in reaching its decision to approve the settlement and certify the class.

4. For the reasons described below, it appears that the proponents intentionally mislead the Court and the class (including Movants) about the said SUPPOSED FACTS, and that the proponents cynically and designedly withheld crucial, real facts from the Court and the class, which real facts are and were sufficiently material to affect the Court's ruling.

5. This motion is based on facts and evidence which were extant at the time of the Fairness Hearing, but which first surfaced after the September 9, 1992 Order and Judgment including, *inter alia*, facts which came to light in: (a) The Application for Award of Attorney's Fees, filed by Class Counsel and certain Special Counsel; (b) The separate Application for Award of Attorney's Fees filed by the law firm of Capretz and Kasdan; (c) An article which appeared in the Orange County edition of the *Los Angeles Times* on October 17, 1992; (d) An article that appeared in the *New York Times* on November 9, 1992; and information about a U.S. Department of Justice criminal and civil review of defendants' underlying acts of fraud on the FDA (which Movants' counsel first learned about on October 30, 1992).

6. Movants, by exercising due diligence could not have discovered this evidence or these facts previously. The matter was out of Movants' reach previously due to time restraints; this Court's refusal to allow discovery or any examination of witnesses at the Fairness Hearings and the

proponents' efforts to conceal the evidence and facts.

E. At the Fairness Hearing, the proponents "covered up" the evidence of defendants' fraud on the FDA concerning defendants' manufacturing practices. The proponents' tactics had the probable effect of creating the false impression in the mind of Judge Speigel that the class members' viable fraud claims were weak and limited only to defendants' under-representation of the rate of strut fractures when in fact, defendants' fraud was much greater in scope and much more egregious.

1. During the Fairness Hearing sessions, the Court limited its fact finding to the argument and representations offered by the proponents wherein their lawyers (none of whom were under oath) purported to describe the likely outcome of the case of fraud the class would present at trial. However, rather than make any presentation about the *strengths* of the class claims, the proponents offered arguments which dwelled solely on the supposed *weakness* of the class claim of fraud. Despite this unbalanced presentation, the proponents purported to tell the Court the whole story, and the Court permitted them to get away with this charade, presumably because the Court respected and trusted the candor and integrity of the lawyers for the proponents.

2. However, the "Application" for attorney's fees filed by Class Counsel reveals that the proponents intentionally withheld from the Court crucial and material evidence which probably would have convinced the Court that the strength of the class claims of fraud was much greater than the Court found it to be. In other words, it appears the Court's respect and trust were abused, and that the lawyers for the proponents were not faithful to their obligations.

3. As a result of the false and misleading presentation by the proponents, the Court was probably persuaded to accept a false, or otherwise misleading set of purported factual circumstances which emphasized the weakness of the class claims.

4. When the Court eschewed any kind of evidentiary or fact-producing process, it *perforce* put the fate of the class members into the hands of the lawyers for the proponents; this imposed an even heavier burden on counsel for the proponents to be candid and forthcoming. As will be shown, regrettably, the lawyers for the proponents were cagey and disingenuous, and they appear to have secreted existing evidence and facts at the Fairness Hearing which were material, and would probably have produced a different result.

5. Movants had filed a written motion and a follow-up letter to the court which requested the Court to hold or allow an *evidentiary* proceeding at the Fairness Hearing; and prior to the Fairness Hearing (at a status conference held in May of 1992), and during the Fairness Hearing sessions. Movants' counsel repeatedly asked the Court to hold or allow an evidentiary proceeding with testimony and cross-examination of sworn witnesses at the Fairness Hearing.

6. The Court initially deferred a ruling on Movants' motions and requests for an evidentiary proceeding at the Fairness Hearing, and made its ruling, denying an evidentiary proceeding, implicitly, in the August 19, 1992 Order.

7. If Movants had been allowed to present testimony in support of their objections of the settlement and class certification, part of their case would have included testimony from Professor Oscar S. Gray, attorney-at-law.

8. Professor Gray's qualifications as an expert witness, and an outline of the opinions he would have testified to (if the Court had allowed an evidentiary proceeding at the

Fairness Hearing) are set forth in Exhibit "A" (attached hereto).

9. Professor Gray's opinion should be given credence and weight in light of the fact that he is the co-author of the leading treatise in torts, F. Harper, F. James and O. Gray, *The Law of Torts* (Little, Brown and Co., 2nd ed., 1986) and is an advisor for the American Law Institute's "Restatement Third of Torts: Products Liability."

10. Professor Gray's opinion letter (Exhibit "A") is incorporated herein by reference because it demonstrates the materiality and importance of the newly discovered evidence of defendants' fraud.

11. Moreover, the proponents' lack of candor, as demonstrated in this Motion, should cause the Court to rethink its ruling on the fairness of the settlement since in reaching its original ruling, it appears that the Court credited the proponents with having accurately stated the facts and law. If the Court does undertake a reconsideration of its original ruling, Professor Gray's opinion (which is submitted as an offer of proof) should be of great help to the Court.

12. Proponents made it a point to argue to the Court that the class fraud claim was limited to the allegation that defendants had reported to the FDA fewer strut fractures than defendants knew about. Proponents avoided any discussion of *other* fraudulent schemes by defendants unrelated to the *under-reporting*, and this probably is what mislead the Court to believe (as evinced by the Court's discussion in its August 19, 1992 Order) that the class claim of fraud was based solely on defendants' under-reporting.

13. While defendants did in fact *under-report* the number of strut fractures, defendants' fraud on the FDA and the medical community consisted *also* of several other schemes to falsely convince the FDA that defendants were complying with the FDA's mandatory "Good Manufacturing Practices" ("GMP"). Defendants' *GMP schemes* had allowed

them to obtain FDA approval of their valves initially, and thereafter, the *GMP schemes* allowed defendants to avoid an early recall of their valves by the FDA.

14. The "Application" filed by Class Counsel, at pp.25-44, contains a section entitled "Summary of Investigation of John T. Johnson and his Law Firm, etc.," wherein Mr. Johnson describes, *for the first time in this case*, the irrefutable evidence of the fraudulent *GMP schemes* practiced by defendants in deceiving the FDA, and inducing the FDA to believe defendants were complying with the GMP imposed by the FDA.

15. All of the evidence of defendants' *GMP schemes*, as discussed in the "Application" by Mr. Johnson, was designedly concealed and withheld from this Court during the Fairness Hearing by the proponents, who obviously did not want the Court or the class (including Movants) to know how pervasive, egregious and wide-ranging defendants' actual fraud was.

16. The proponents' concealment from the Court and the class of the existence of Mr. Johnson's irrefutable evidence of defendants' fraudulent schemes concerning the GMP, violated Class Counsel's, and Special Counsel's fiduciary duties to the class; counsel for the proponents' also violated their duties under Fed.R.Civ.Pro. 11, and 3.3 of the Rules of Professional Responsibility of being candid in presentations to the Court.

17. The breaches of proponents' counsels' duties resulted in a skewed and erroneous opinion on the part of the court with regard to the scope and strength of the class causes of action based on fraud.[3]

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[3] Beginning at page 50 of the Court's August 19, 1992 Order finding the proposed settlement to be fair, the Court expressed the view that if the case were not settled, the class

probably would not prevail at trial on a fraud theory, stating, "The plaintiff class still would have tall hurdles to mount to actually prevail at trial." *Id.* at p. 50.

The Court also revealed its belief that the alleged fraud of defendants consisted solely of reporting to the Food and Drug Administration ("FDA") inaccurate fracture rates for the valves. In fact, as Mr. Johnson proves convincingly, defendants were operating several other schemes which defrauded the FDA in matters unrelated to the under-reporting of fracture rates. Mr. Johnson's evidence therefore establishes the merits of the class case of fraud based on defendants' deception in record-keeping relating to defendants' attempt to convince the FDA that they were following GMP. Mr. Johnson's evidence shows that defendants made false representations and presentations to the FDA which were calculated to fraudulently induce the FDA to find that defendants were complying with the FDA's mandatory GMP standards. Defendants' deception about their GMP allowed defendants to evade an early FDA recall, and may have allowed defendants initially to obtain FDA approval on the basis of bogus records, which falsely indicated that defendants' GMP, as reflected in the records, complied with FDA requirements. *Id.* at p. 51.

The fraud mentioned in Mr. Johnson's account would also overcome the Court's speculation in the August 19, 1992 Order that the statute of limitations might present a bar to some class claims. Under the law of almost every jurisdiction, willful concealment and fraud toll the time periods.

Mr. Johnson's evidence, as explained in the "Application" means that the class fraud claims could be proven with *evidence* already in special counsel's hands, that physicians relied on the fact of FDA approval, even though the approval itself was granted initially and then allowed to continue because of defendants' fraudulent reports to the FDA about GMP. If the Court had been told about this evidence, it is likely it would have realized that the

18. The evidence of fraud collected by Mr. Johnson cannot be dismissed as cumulative or merely impeaching because not one word of defendants' schemes relating to the GMP was uttered at the Fairness Hearing; it also cannot be belittled as not being material because Class Counsel and Mr. Johnson themselves state at p. 25 of their "Application," "Mr. Johnson's legal services and his investigation during the last 5-1/2 years has been a major motivating factor to this class action settlement." Moreover, what could be more material than the fact that in the absence of this evidence, the Court grossly under-estimated the scope of the class claims of fraud, and correspondingly, grossly under-valued their likelihood of prevailing on the merits.

19. Although Mr. Johnson's account of the *evidence* his investigation revealed certainly would make the class claims based on fraud seem invincible, regrettably, the Court was intentionally deprived of any hint of Mr. Johnson's

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class members could easily get their fraud case to the jury by establishing that if the FDA had not been defrauded (and defendants had not attempted to fool the FDA), physicians would have been barred by law from even prescribing the valves "Application." *Id.* at pp. 50-51.

Important also, a valve which did not receive FDA approval would be worth *less* to the patients than valves which did not receive FDA approval (or which received FDA approval through fraud). The valves the class members bought were therefore not worth what the class members paid for them since they paid a falsely-inflated price in reliance on the unlawfully-induced belief that defendants had honestly and lawfully weathered the scrutiny of an FDA approval process and had properly obtained FDA approval of their valves. (See Exhibit "A" letter of Professor Oscar S. Gray attached hereto.)

evidence and findings at the Fairness Hearing, due to the proponents' apparent plan to tell this Court only the negative aspects of the class claims of fraud, and to make it appear that the class would surely never prevail at trial.

20. Obviously, the proponents had reason to believe that if this Court was told timely of Mr. Johnson's evidence (*i.e.*, at the Fairness Hearing), the Court would have a basis for finding the settlement unworthy of approval. Therefore, at the Fairness Hearing, Mr. Johnson, along with the other counsel for proponents, were *silent* about his investigation which uncovered highly incriminating evidence. Instead, they all told the Court how weak the class claims were. It was only at fee application time that we learned Mr. Johnson had "gotten the drop on defendants."[4]

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[4] Mr. Johnson's narrative discloses how intransigent defendants were in the case he prosecuted when it came to making discovery. The PA Class Objectors in the *Taylor v. Shiley* case, Court of Common Pleas, February Term, 1986, No. 2087, pending in Pennsylvania (as discussed in earlier submissions) were obliged also to endure defendants' intransigence during discovery, and they were still enmeshed in discovery wars with defendants, at the time the settlement was publicized. Indeed, in January of 1992, Movants still were in the process of reviewing indices to six million of defendants' documents. Thus, Movants did not yet discover the evidence of GMP fraud (which Mr. Johnson had in his possession, but did not share with the class until he filed his "Application" for fees). Thus, as far as Movants and this Court are concerned, this is truly newly discovered evidence.

Moreover, Mr. Johnson himself made a speech at the Fairness Hearing where he admitted that he did not share any of his *evidence* with Movants' counsel, and that his case had advanced further than the *Taylor* case. Thus, Mr. Johnson said:

21. In Class Counsel's "Application," Mr. Johnson narrates a summary of the evidence he uncovered concerning *several* fraudulent schemes practiced by defendants during the

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> "First of all, Your Honor, I want to be clear. I have been involved in this litigation since 1987. I've met Mr. Green before. I assure the Court that he's never been a key player in any of this litigation. I have interviewed over 50 former Shiley employees, taken their depositions, and he's never interviewed the key manufacturing welding personnel, to my knowledge.
>
> "Secondly, as for his clients, whoever they are, I know they have heart valves, but he has never sent me their manufacturing records and asked me to share information with him about what's in his clients' records based on what we know. That's the only two points I want to make about that." N.T. 7/22, 153-1154 (Johnson).

Movants' counsel did not make any inquiries to Mr. Johnson because they had no knowledge of what was going on in his case in Texas. However, Mr. Johnson's speech was apparently intended to sidetrack the Court from a key issue. The fact that Mr. Johnson interviewed and took depositions of defendants' employees did not help the class when he and Mr. Chesley decided at the Fairness Hearing to withhold the evidence Mr. Johnson collected. There is no doubt that Mr. Johnson knew more about defendants' liability to the class than Movants' counsel. But Mr. Johnson neglected his duty as *special counsel* to the class by not informing the Court of the evidence of defendants' liability during the Fairness Hearing -- that is when the class members *needed* Mr. Johnson and Mr. Chesley to educate the Court about the true strength of their claims.

manufacturing of valves. Mr. Johnson's evidence, should command the Court's attention because it includes a copy of one of defendants' manufacturing records known as the *"hiding our most serious defect"* memo ("Application." *Id.* at 38), Mr. Johnson links this document to "smoking gun"-type evidence ("Application." *Id.* at 40).

22. Mr. Johnson's evidence, as discussed in Class Counsel's Application," identifies the following *proven facts*, all of which the proponents were obligated to disclose to this Court but none of which were even mentioned at the Fairness Hearing:

(a) Thousands of valves with cracks in their wire struts were falsely reported to the FDA by defendants on GMP documents to have been re-welded by defendants' employee #2832, when in fact, employee #2382 [sic] had never welded any valves and had actually quit defendants' employ before these valves were manufactured (*Id.* 33, 42);

(b) Instead of performing required re-welding on thousands of cracked valves, the cracks were merely polished by defendants (to save defendants' manufacturing costs) but were reported to the FDA as having been rewelded (*Id.* at 33);

(c) Fraudulent entries were made by defendants on manufacturing records which were required by the FDA, and periodically inspected, thus the FDA was fraudulently induced to believe that thousands of cracked valves had been re-welded (*Id.* at 33);

(d) Defendants lied to the FDA and gave false stories and alibis when information relating to defendants' bogus records first surfaced. (*Id.* at 34, 35);

(e) Defendants' documents establish also evidence of additional "brother and sister schemes" concerning defendants' false records and misrepresentations made

to the FDA on other crucial matters. (*Id.* at 36);

(f) Mr. Johnson uncovered still another scheme which involved the rebuilding and reconditioning of thousands of previously scrapped, quarantined, junked and red-tagged Bjork-Shiley convexo/concave heart valves, and the subsequent removal (by defendants) of their original control numbers from their flanges *after* they were rebuilt." (*Id.* at 36);

(g) Defendants' schemes to defraud the FDA and medical community as well as defendants' related activities created a higher risk of fracture for the valves involved in the schemes. (*Id.* at 38);

(h) After the FDA finally made public some of defendants' fraudulent acts, in December 1990, it took action which demonstrates that if defendants had not defrauded the FDA, it would not have approved defendants' heart valves for use on humans. (*Id.* at 41).[5]

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[5] Defendants' fraud in fabricating GMP records and in lying to the FDA during FDA inspections of defendants' manufacturing operations is therefore a discrete theory in the class claim of fraud which is separate from defendants' fraud in under-reporting to the FDA the fracture rate. If defendants had been truthful, the FDA would have found that the valves could not be approved because (a) defendants' fracture rate was too high; and/or (b) defendants were not following good manufacturing procedures. Either one of these elements of fraud, if detected prior to 1982 would have caused either the disapproval of the valves by the FDA or a recall for a fraudulently obtained FDA approval. Since the two tracks of defendants' fraud each independently resulted improperly in the valves being available for sale, the causal connection between each element of defendants' deceit and the class members injury is irrefutable.

23. Class Counsel was fully aware of Mr. Johnson's evidence prior to the Fairness Hearing since in April of 1992, Mr. Johnson wrote to Mr. Chesley and discussed the defendants' fraud (if it had not been discussed with Mr. Chesley previously). (*Id.* at 47).

24. Despite the evidence of GMP fraud and other fraud in the manufacturing process, not one word of this hard evidence was discussed by any of the proponents at the Fairness Hearing, even though the Court explicitly stated it wanted to know about the strengths of the class claims of fraud, and the Court specifically discussed, in the August 19, 1992 Order, the fraud-issue presentation of the proponents had made at the Fairness Hearing, and in their papers.

25. The failure to discuss Mr. Johnson's evidence must be viewed as a calculated effort to *sandbag* this Court and to beguile the Court into believing that the class had a weak case on the merits. The Court's Opinion of August 19, 1992 demonstrates that the proponents' scheme was successful, and that the Court did end up believing that the

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Moreover, as Professor Gray points out in page 1 of Exhibit "A,":

> "If, when the valves were sold, they have not been approved by the FDA, they would, of course, have had no valve... [T]he entitlement to compensatory damages in fraud is complete based on the difference in <u>value</u> between the price of the product as falsely promoted, and what the value would have been (viz. Zero for lack of FDA approval) if the product had been truly presented."

If Movants had been allowed to introduce evidence (as they had requested in open court and in a written motion), they would have offered the sworn testimony of Professor Gray. Exhibit "A" is therefore akin to, and is submitted herein as an *offer of proof.*

fraud claims of the class were both weak and limited to defendants' under-reporting of strut fractures.

26. At the very least, the proponents committed a grave disservice to the Court and the class members by their unbalanced *"hear no evil, see no evil, speak no evil"* explication of the *weakness* of the class claim, with no discussion of the strong evidence of fraud, which ironically, is now being trumpeted by Mr. Johnson and Mr. Chesley as part of their plea that the Court pay them a large fee for Mr. Johnson's efforts in uncovering this evidence.

27. Most importantly, when Mr. Johnson sought and obtained the status of "special Counsel," the *ownership rights* to the evidence passed to the class members. Accordingly, Class Counsel and/or Mr. Johnson were obliged to deliver the evidence to the class at the Fairness Hearing, when it could have done the class members some good. The tactics employed by Messrs. Chesley and Johnson have actually allowed them to withhold the evidence to the detriment of the class (by inducing the Court to grant an *uninformed* approval of the settlement), and to then use the evidence *against* the class a second time when they now submit it as a basis for large fees -- which would sap the settlement funds due to the class members.

28. It is a travesty of the proceedings that at fee award time, after they had hid the fraud case under the rug during the Fairness Hearing, Class Counsel and Special Counsel now have found their voices, and that in asking for a fee of $21.4 million, they now pat themselves on the back for the *wonderful work* Mr. Johnson did in discovering and proving defendants' fraud.

29. Therefore, this newly discovered evidence and the proponents' acts in intentionally withholding the evidence warrants relief under Rule 60(b).

F. The proponents failed to provide the Court with a true account of defendants' prior medical research activities, and mislead the Court about the research component of the settlement, as well as the fact that the $75 million amount set aside for diagnostic services is grossly inadequate and will not cover the estimated $110 million-per-year cost for class members to take advantage of the new diagnostic techniques.

1. During the Fairness Hearing, the Court rejected the request of the PA Class Objectors that they be permitted to question the attorneys for the proponents. The PA Class Objectors pointed out that it was the attorneys who were providing all of the supposed facts to the Court and not sworn expert or fact witnesses. (The PA Class Objectors had asked the Court to require the proponents to put on real evidence and testimony, but this too was denied.) The Court likewise refused Movants' request that the persons who submitted the self-serving and untested affidavits attached to the proponents' briefs be obliged to testify in court and be cross-examined.

2. As a result of the procedure the Court adopted, it and the class members were wholly at the mercy of the proponents' self-administered duties of candor and integrity, both in directing the Court's attention to what the proponents determined were the salient issues, and in determining the content of what would be revealed to the Court.

3. The proponents glorified the portion of the settlement they called the "Patient Benefit fund" of $75 million (which is also referred to as the "Research Fund") and said it would be devoted to research to find a diagnostic technique that would identify valves that were more dangerous, as well as to pay fully for the costs of administering the diagnostic technique to class members,

assuming that such a technique was discovered. The proponents ballyhooed this Research Fund as something that would provide a major and needed benefit to the class members. However, in the course of their presentations, the proponents purposefully, and cynically rendered obscure the status of defendants' vast, prior-funded and ongoing research efforts into diagnostic techniques to discover valves that would be likely to malfunction, which ongoing research appears to be wholly redundant to the supposedly *new* research contemplated by the settlement.

4. Newly-found evidence, as reported in the *New York Times* on October 1, 1992 and November 9, 1992, establishes previously hidden information about the Beaumont diagnostic techniques, and shows that the proponents specifically withheld from the Court information which would identify and clarify their already existing legal or other obligations to conduct research into diagnostic techniques; and they likewise did not inform the Court how the settlement would impact on that pre-existing obligation.[6]

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[6] This was a material shortcoming of the proponents. For example, if we assume that under some FDA-imposed obligation defendants were obliged to conduct research to detect which of their heart valves are likely to fail, the settlement might provide no research-related benefit to the class members since they might have been the beneficiaries of such research without the need for it to be covered in the settlement, and the money allocated for research could have been (or should have been) paid to them directly. Moreover, the settlement now appears to be merely a tactic for defendants to move the cost of the pre-existing research programs off of their corporate balance sheets (where they might get no favorable tax treatment) into a category called "settlement of litigation," where defendants would possibly get favorable tax benefits.

The law firm of Capretz and Kasdan, by the Court's appointment of James Capretz were made Special Counsel to the class by this Court.[7]

The record of the Fairness Hearing is barren of any *facts* which would explicate these and related issues. However, as will be discussed, the many facts that proponents intentionally withheld from the Court at the Fairness Hearing concerning defendants on pre-existing valve-related research and the obligations to do research which suddenly are surfacing in the public media, now make the shortcomings in the proponents' presentation look like a calculated disrespect for the intelligence of this Court.

Movants had raised the issue of defendants' pre-existing obligation to conduct research. The Court would not allow Movants to question any of defendants' people about this nor did the Court itself ask even one question. Ironically, in the August 19, 1992 Order, the Court mentioned the issue but states that Movants "give no evidence to support this assertion." *Id.*. p. 56. Thus, the Court demanded "evidence" from Movants while it accepted unsworn argument from the proponents; and handcuffed Movants in their efforts to obtain and put on evidence.

[7] According to the "joint Report of Timely Opt-outs" filed by counsel for the class and defendants on October 15, 1992, special counsel Capretz and Kasdan advised 435 of their class member clients to file written elections to opt out of this settlement. Special Counsel's own clients therefore used their "feet" to give this settlement a *no confidence* vote of disapproval. Based on the Capretz "Application," for counsel fees, that law firm considered its lawyers to be specialists in Shiley heart valve litigation brought on behalf of persons whose valves had not fractured. The Capretz clients *actions* nullify the contrived soothing words of the proponents concerning the supposed worth and value of the settlement compared to what a *trial lawyer* could reasonably expect

6. In the Application for Award of Attorney's Fees and Costs filed by the law firm of Capretz and Kasdan ("Capretz Application"), at N. 15, p. 43, makes reference to the October 1, 1992 *New York Times* article, and they state:

> "The recent story from the *New York Times* (Exhibit L to the Capretz "Application") regarding a new technology which may allow the detection *in vivo* of incipient or incomplete strut fracture, obviously raises serious questions about the settlement and its implementation."

7. The use of the phrase "serious questions about the settlement" as quoted above from the Capretz "Application" demonstrates that until the *New York Times* article on October 1, 1992, even Special Counsel Capretz was probably as much in the dark about the "serious questions" raised by the article as was the Court and the class. However, defendants obviously knew all about their on-going research programs; and Class Counsel should have known.

8. The October 1, 1992 *New York Times* article states, "If the new approach works on patients it could help save lives, but at a *potentially* enormous cost to the company, patients would have to be screened every six months at a cost

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to win for his clients in a litigated case. (*See* discussion, *infra*. in Section G.) The fact of Special Counsels' clients having opted out must be viewed as additional newly discovered evidence, because during the Fairness Hearing, none of the Special Counsel would state on the record that their private clients were opting out. It now appears that Special Counsel Johnson also advised some of his clients to opt out.

of hundreds of millions of dollars a year.[8]

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[8] This part of the *New York Times* article raises at least three questions to which this Court should have been supplied answers at the Fairness Hearings by the proponents: If class members must be screened one or more times annually,

(1) Is the likely cost of screening patients to be in the hundreds of millions of dollars annually?

(2) What is the real benefit to class members of spending *their* monetary recovery in the settlement on research for a diagnostic technique that neither they nor the settlement fund could pay for, and thus would not be available for them?

(3) What agreements with or obligations to the FDA or anyone else have defendants undertaken to lead the *New York Times* to write that the diagnostic tests would result in "enormous cost to the company"?

It is significant that Section 5.1 of the final version of the settlement does not require defendants to replenish the $75 million "research" fund when it becomes depleted. Yet this research fund is where the class will obtain funding for any new diagnostic procedures.

Due to the proponents' skewed and contrived presentation of information at the Fairness Hearing about defendants' pre-existing research program and the state of the art of diagnostic techniques, the Court was never sufficiently informed to even know it should have asked these questions. The Court's refusal to allow any cross-examination or to hold any form of evidentiary hearing put the onus on the proponents to be totally candid and *up front* with the Court. Since it is reasonable to expect that the Court's faith in the integrity of the proponents should be shaken by the many things which have surfaced after the Judgment, the Court now should enter an order to enable the Movants to ask the Sixth Circuit that the case be remanded for an opening of the Judgment

9. According to the October 1, 1992 *New York Times* article, defendants intentionally suppressed the publication or any disclosure of information about their ongoing research program's results until *after* the Fairness Hearing, specifically to account for "legal aspects."[9]

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and an evidentiary hearing.

[9] The October 1, 1992 *New York Times* thus reported:

> "Researchers working on the project said that as a condition of participating they agreed to let Shiley decide when their findings could be announced. The company kept the investigators mum until one of them described the work to a reporter."

According to the article, defendants spokesman gave the reason for secrecy as, "There are legal and regulatory as well as scientific aspects to consider." *Id.* However, the *New York Times* reported that defendants violated medical ethics by controlling the timing of the release of the information to accommodate their ulterior purpose of ramrodding the settlement of this case, through this Court, and indeed, the article states that defendants' researchers themselves thought that the information about their discoveries should have been released in a more timely manner. Thus, the October 1, 1992 *New York Times* article reported.

> " Some of the researchers said they were chafing at bit to report their achievements. Dr. O'Neill said: 'There was a lot of controversy. I wanted to announce this. I think the public needs to know.'". *Id.*

The article reported further.

> "Ethicists said they were disturbed by the secrecy of the research. Essentially, they said, patients have a right to know, even if they cannot have access to the screening method yet. They added that if they had a Shiley valve in their own heart, they certainly would want to know what was going on at Beaumont Hospital.
>
> "Dr. Arthur Caplan, director of the Center for Bioethics at the University of Minnesota, said that keeping this study secret is not at all the same as keeping a study of a new drug or device that is intended to help sick people. In that case, when scientists feel they have enough evidence to convince their peers that their work is valid, they go public, he said. 'They don't want to raise false hopes or put people off on false leads.'
>
> "But, Dr. Caplan said: "That's not the goal here. The goal is to try to give comfort and help people who have been harmed. Patients,' he said, 'are not owed protection from false hope.
>
> "They are owed an opportunity to know precisely what is being done to help them, what their options are to get out from under their state of anxiety.'"
>
> Dr. Norman Daniels of Tufts University agreed. 'The company has already acknowledged continuing responsibility or they wouldn't have undertaken the research. Under those conditions

10. Regrettably, at the Fairness Hearings defendants and the other proponents withheld from the Court the testimony or any other meaningful contact with their researchers. Indeed, defendants gave much more information to the *New York Times* reporter than they presented to this Court. This Court was clearly lured into the trap of approving the settlement blindly, in reliance on misleading rhetoric from the proponents and virtually an empty factual record.[10]

> it seems reasonable for patients to want to know what the company has found out,' he said."

[10] The defendants provided the *New York Times* with access to key researchers and "spokesmen" who cogently described the status and meaning of the research in the October 1, 1992 article:

> "The valve consists of a disk held by two metal struts that are attached to a metal ring. The company had some hints that the valves fail when first one strut and then the other fractures at its base. And it had reason to believe that months can go by between the first strut fracture and the second, catastrophic one.
>
> Experiments on Sheep
>
> "For example, Dr. O'Neill said, when valves that failed were removed from patients, they would have one fresh fracture and one that was older and burnished, 'suggesting it had been broken for a period of time. In addition, one company study showed that 8 of 131 valves had

been removed from patients for other reasons had one fractured strut and one intact one, indicating that a valve can function for a time with one cracked strut.

"To see how long a hobbled valve can function, the company did an experiment with sheep, Dr. O'Neill said. Scientists implanted valves with one cracked strut into the animals, whose hearts resemble human hearts. It took 6 to 18 months before the second strut broke and the valves failed.

The findings indicated that is there were a way to see a crack in one strut of a patient's valve, the patient could be warned in time to have the valve replaced before the valve failed completely.

"Dr. O'Neill said that the Shiley contracted with Siemens, an X-ray manufacturer, to equip an X-ray machine so that it would make clear images of a Shiley valve. They needed to detect cracks as small as 25-millionths of an inch. Dr. O'Neill said, so small that they could only be seen with a magnifying glass. To test the machine. They put valves into an artificial heart and submerged the heart into a tank of water whose depth was chosen to simulate x-raying a heart through a person's chest. Some of the cracks were visible but some were almost impossible to see in the X-rays, Dr. O'Neill said.

How to Read the X-Rays

"So, last winter, the company approached two research teams, one led by Dr. Steven Nissen of the Cleveland Clinic and the other by Robert

11. The November 9, 1992 issue of the *New York Times* (a copy of which is attached hereto as Exhibit "B")

Seizer of the Jet Propulsion Laboratory in Pasadena, Calif., and asked them if they could use computerized image enhancement to find the cracks.

"Dr. Nissen, who was also authorized by the company to speak, said the two research teams independently solved the problem. Both used computers to intensify the contrast in the X-ray pictures, allowing them to see all but the tiniest cracks. Then, in a more objective approach, they had the computer graph the density of the X-ray image along the length of the strut. When there is a crack, there will be a sudden, sharp drop in density. This method, Dr. Nissen said, allowed them to find even the tiniest cracks. He said he found all but one of the 40 cracks in struts on X-rays Dr. O'Neill provided and Mr. Selzer found every one. Neither identified cracks when there were none.

"Encouraged by these results, the company got permission from the Food and Drug Administration for a 300-patient study at Beaumont Hospital to see if the equipment can detect cracked struts. Each X-ray is duplicated in Hollywood and then sent to five medical centers for evaluation. In addition, Dr. Nissen and Mr. Selzer evaluate the X-rays by graphing the X-ray densities. Dr. O'Neill said that the plan was to send a letter to *The New England Journal of Medicine* as soon as a crack was detected. That was how the study would be announced to the world, he said."

reported additional information which had not been disclosed previously.

12. Thus, the *New York Times*, on November 9, 1992 reported that on November 1, 1992, surgeons, based on findings from defendants' new, x-ray method, diagnostic technique, removed a valve from a patient which defendants' diagnostic technique predicted would be found to have a hidden fracture -- and the diagnosis was proven correct.

13. The November 9, 1992 *New York Times* article stated also, at p. 1 (*see* Exhibit "B"),

> "In the past year, Shiley has supported a research program to discover a way to find failing valves before they catastrophically break. And now, it seems, the method works.
>
> "Mr. Genteman was the test case, the one that established the sensitivity of the new system, said the director of the program at William Beaumont Hospital in Royal Oak, Mich. Doctors there have used the system to detect and replace cracked artificial valves in two other patients, but it was not until they uncovered the problems in Mr. Genteman -- where the crack was far more difficult to detect -- that they felt certain that the new technique worked."

14. Moreover, the *New York Times*, quoting Dr. William O'Neill, the director of defendants' research project, said, "preliminary data indicate that far more valves may be cracked than anyone expected." (*Id.*)

15. Dr. O'Neill had expected to find a fracture rate of 3/300 but actually found a fracture rate of 3/57. Dr. O'Neill said that the rate of 3/57 fractures "stunned" him. Dr. Paul Meier, a statistician at the University of Chicago,

said it was "highly unlikely" that defendants' prediction of only one percent fractures would hold up in light of the 3/57 test results.

16. Dr. O'Neill said that he expected to train doctors to set up about ten screening centers across the United States.

17. However, as reported in the November 9, 1992 *New York Times* article, the cost of actually using the technique to benefit class members could possible cost "hundreds of millions of dollars." (*Id.*)

18. The November 9, 1992 *New York Times* reported that each class member would have to be screened at least twice a year, and the lowest estimated cost for the screening, will be close to $1,000 per screening of each class member (*Id.*).[11]

19. Defendants' spokesman is now trying to discourage class members from taking advantage of the new screening technique, to put a negative *spin* on the *facts* and to set up an alibi for not disclosing the research to this Court as indicated by the November 9, 1992 *New York Times* article.

> "Dr. Arthur Caplan, director of the Center for Bioethics at the University of Minnesota, said now that it had been demonstrated that the method worked, 'it makes it mandatory that they make the

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[11] Assuming 55,000 class members with valves, and a screening cost of $2,000 each year for the two screenings, defendants would have faced an annual cost in excess of $110 million. Assuming also that the class members would survive to only an average age of 60, it is obvious that defendants' diagnostic cost liability alone, over a 15-year period, could well exceed one billion dollars.

technique available to those who have a Shiley valved in their chest.'"[12]

20. The November 9, 1992 *New York Times* article quoted the opinions various experts (who were apparently not aware of the fact that defendants had already evaded *massive tort exposure* when this Court approved this settlement), wherein defendants' liability was discussed:

Ruinous Liability Cases

"Dr. Caplan added that the arguments over who should be screened and when 'take on a different flavor when what one is talking about is enormous potential liability, huge costs in terms of the number of people who need to be screened, a fair amount of proprietary interest in perfecting the technique and a huge corporate entity with very deep pockets sitting

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[12] Attached hereto as Exhibit "D" is a "Dear Sir or Madam" letter sent by Dr. O'Neill of the William Beaumont Hospital which was sent to all "patients whose valve serial numbers indicate they have a 29 mm or larger valve. This means that a large portion of the class received such a letter.

The letter said that, "recently developed x-ray and sound technologies may be helpful in determining the physical condition of individual BSCC heart valves."

The recipients were then invited to participate in a study of the new technology and the letter states,

"the x-ray exposure will be less than you would receive from a conventional catheterization study."

Therefore, defendants themselves recognize that a large number of class members qualify for the new x-ray technique, and that the technique does not pose a significant risk of excess radiation.

nervously in the background.' For Pfizer, he added, referring to major liability suits that were ruinous to top corporations, 'this is Dalkon Shield II, it's asbestos II.'

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"Financial analysts said the new test and its findings could represent a tremendous liability for Pfizer.

"What Pfizer has done is open a Pandora's box,' said Hemant Shah, an independent financial analyst in Warren, N.J. 'Once they find a crack, they have to correct it, and that's pretty expensive.' Mr. Shah added that Pfizer has been extraordinarily successful, with several very lucrative drugs. But, he said, because of Pfizer's successes, analysts have paid little attention to the looming liability for the heart valve patients. In my opinion, wrongly.'"

(*Id.*) A9: Exhibit B.

21. According to the experts interviewed by the *New York Times*, it appears that defendants' tort liability exposure, but for the approval of this settlement, would have been in the billion (plus) of dollars range *for diagnostic costs alone*. Yet none of this was discussed or disclosed by the proponents at the Fairness Hearing, and this must be considered newly found evidence because Movants were denied the discovery and cross-examination they needed to ferret out the facts at the Fairness Hearing.

22. Counsel for defendants submitted to the court the Affidavit of Roger Sachs, M.D. dated June 8, 1992. Dr. Sachs stated that in light of his own experience, and the fact

that the President of the Shiley Heart Valve Research Center reports to him, that he therefore was qualified to give the Affidavit (¶ 2).

23. Dr. Sachs' Affidavit appears to now have been proven misleading, if not false, by the two *New York Times* articles mentioned above.

24. Dr. Sachs tried to convey the impression that the research for diagnostic techniques was all *theory*, and years away from implementation (contrary to what the *New York Times* and defendants' own researchers have reported). Thus, in conveying this impression, Dr. Sachs stated the following supposed (and now disputed) facts in his Affidavit:

(a) The research involving screening "to date is preliminary, and there can be no assurances that such methods will be proven feasible." (*Id.* at ¶ 3).

(b) "A state-of-the-art, high resolution, x-ray machine, originally designed for industrial use, has been identified that could be converted for medical use. Considerable work remains to be done, however, before x-ray technology will be ready for use as a means of reliably and safely assessing the condition of implanted C/C valves." (*Id.* at ¶ 9).

(c) Although it is not possible to predict all of the work that may be required, including work that may be required to secure FDA approval or acceptance, the remaining tasks include the following:

- laboratory and animal studies to refine the x-ray techniques, to generate data with which to analyze the reliability of the system, and to establish quantitative standards for analyzing the x-ray images generated;
- investigations into image processing to enhance the diagnostic capability of the equipment;
- research and development on the optimum

configuration of the x-ray machines to be used; and

clinical studies to verify the accuracy, reliability and safety of the proposed x-ray equipment and techniques. (*Id.* at ¶ 9).

(d) The research, development and clinical studies would cost "approximately $10 million," and would take "approximately two years" to reach a conclusion.

(e) "Although precise predictions cannot be made at this time, I also estimate that it will take an additional approximately $10 million, and possibly as much as $15 million, to perform the diagnostic techniques on patients worldwide, once the technology and methods have been approved by the FDA." (*Id.* at ¶ 12).

25. The facts in the *New York Times* articles and the reports from defendants' own scientific researchers and surgeons dispute Dr. Sachs on each of these points, especially his effort to downplay the progress of the research, to minimize the costs to the class members of using the new screening diagnostic technique, and to exaggerate how long it would take to reach a conclusion.[13]

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[13] Dr. Sachs, an obviously loyal employee of defendants, knew his *mission* in the Affidavit was to confuse and beguile this Court by making the settlement's research fund component seem reasonable and responsive to the supposed pace of prior research. However, to achieve success on his *mission*, Dr. Sachs was apparently forced to inflate, exaggerate and manipulate the facts, as seen when the Sachs affidavit is measured against the *New York Times* articles. It is incredible that the *New York Times* and defendants' own researchers would be talking about annual costs of over $110 million, *each year* to conduct screening but that Dr. Sachs thought he could get away with telling this Court, in his

26. Perhaps most egregious of all of Dr. Sachs' liberties with the facts is his statement that it will cost "only $10 million, and possibly as much as $15 million to perform the diagnostic techniques on patients worldwide." (*Id.*)

27. Since the real cost of performing each diagnostic techniques on class members have now been estimated at more than $1,000 per use, and since there are approximately 55,000 class members who will need the technique, twice each year, for as long as they live (or their valve is found to have a fracture), the annual cost of the technique would be much more than $15 million *each year* -- actually $110 million each year![14]

28. It is noteworthy that the settlement agreement provides that the "Patient Benefit Fund" is the sole source for payment of the costs of performing these diagnostic services. (*See*, Supplemented Agreement of Compromise and Settlement, 8/3/92 at § 5.2.2.)

29. However, Shiley's obligation for the Patient

Affidavit, that these costs would not exceed $15 million.

[14] At ¶ 11 of his affidavit, Dr. Sachs states that the research "will be able to develop reliable screening and diagnostic techniques that would be available to benefit a *large majority* of the C/C valve patients living today." Accordingly, we must assume that he expects most of the 55,000 living valve recipients to be candidates for this $2,000 per year expense.

The fact that Dr. Sachs' sworn statement at the Fairness Hearing sought to maximize the number of class members who will benefit from the new diagnostic technique should be kept in mind when and if defendants seek to crawl away from it by arguing that their new technique is appropriate only for a select few of the class members. This seems to be their current alibi. *See* the *New York Times* articles.

Benefit Fund ceases when a total of $75 million has been deposited (*see, Id.*, Settlement Agreement at 5.1).

30. The only obligation Shiley has for continued reimbursement relates to actual valve replacement, and significantly, it has no obligation to pay for any diagnostic services after the $75 million is exhausted (*Id.*, Settlement Agreement at 5.1).

31. The $75 million Patient Research Fund, which is funded at an annual rate of only $6.25 million (after the initial deposit of $12.5 million), will be burdened with the following ambitious list of costs and depletions:

(a) research and development of diagnostic techniques (*Id.* , 5.2.1(a));

(b) research concerning the characterization and/or reduction of rights of valve replacement surgery (*Id.*, 5.2.1(b));

(c) costs of performing diagnostic services (*Id.*, 5.2.2);

(d) payment of expenses of explant surgery (*Id.*, 5.2.3), including hospital care, medical supplies and physician and professional fees (*Id.*, 5.2.3.2);

(e) expenses of the supervisory panel (*Id.*, 5.4.2);

(f) payments of $38,000 for class members who qualify for a valve replacement which does not result in death or total disability (*Id.*, 5.6.1.1), and loss of income of up to $15,000 per week for up to 52 weeks;

(g) payments to each class member who suffer death or permanent disability of up to $2 million (*Id.*, 5.6.2.1; 7.2; 7.3; Exh. C).

32. As shown by the said "ambitious list" of costs and depletions from the Research Fund, the $75 million, especially in the piecemeal manner in which it shall be deposited by defendants, will in no way be adequate to cover the cost of diagnostic services.

33. At the Fairness Hearing, the proponents

therefore misled the Court and the class (including Movants) about the supposed benefits of the Research Fund, the assurance of availability of money from the Research Fund to pay for diagnostic costs and the actual status of the research efforts.[15]

34. At the Fairness Hearings, defendants' counsel, Mr. Klingsberg, served the purpose of clouding the issue, confusing the record and providing cover for Dr. Sachs [N.T. June 5, 1992, pp. 163-164 (Klingsberg)].[16]

35. In short, at the Fairness Hearing, the Court and the class members, including Movants, were simply not told the facts candidly or in any way which fairly portrayed the truth.

36. Special Counsel James Capretz, in discharging what he apparently views as his duty to the class, issued a press release to the major newspapers on or about November 6, 1992 (attached hereto as Exhibit "C").

37. Mr. Capretz seemingly agrees with the points raised by Movants with regard to the newly discovered

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[15] As discussed above, the fact that defendants instructed their researchers to conceal the benefits of the research until after this Court gave them their expected approval of the settlement, takes on a sinister flavor. Defendants knew that if their researchers were not muzzled, the obvious sham nature of the Research Fund and their hollow words of praise for the settlement might be exposed, thus derailing their orchestrated efforts to get the settlement approved.

[16] The Court's list in the August 19, 1992 Order of the documents it relied on does not mention the Sachs Affidavit, although some of defendants' briefs are included. Presumably, the Court did rely on the Sachs Affidavit itself, or through Mr. Klingsberg's recitation of similar matters.

evidence that casts doubt on the integrity and legitimacy of the proponents' presentation at the Fairness Hearing.

38. Presumably, this Court will consider the views of Mr. Capretz in the context of the Special Counsel status the Court conferred upon him; and presumably the Court will not view Mr. Capretz' statements as the product of a lawyer who "has become emotionally involved in this litigation" (Order dated 8/19/92 at p. 18, N.8).

39. Mr. Capretz states in his press release,

> "Subsequent to the settlement agreement, which has been appealed, new disclosures relative to the Shiley heart valve situation have come to light that many participants in the settlement agreement, including Irvine, Calif. Attorney James T. Capretz, believe have a significant bearing on the settlement agreement and on its pending appeal."

40. Mr. Capretz laments in his press release the failure of Mr. Klingsberg and defendants to be candid about the new x-ray diagnostic technique during the Fairness Hearing, and states:

> "I believe, however, information about this device should have been fully disclosed by Shiley and Pfizer during the discovery and testimony phases of the class action settlement hearings before U.S. District Judge S. Arthur Spiegel in Cincinnati this past summer. Even today implantees are unable to get complete and accurate information on the status of this important research."

41. Mr. Capretz then explains why this newly

discovered and previously withheld evidence of the x-ray diagnostic technique might have changed the outcome of the Fairness Hearing:

> "Heart valve recipients were required to make the critical decision of either staying in as part of the class action suit, or opting out of the suit to pursue their claims individually. All valve recipients should have had at their disposal all relevant information concerning the heart valve, and that information certainly should have included the existence of the detection device. I believe it is quite reasonable to assume that some of the recipients who opted out of the suit may have instead decided to be part of the class action settlement had they known about the device requirements and Pfizer's commitment to its funding. Furthermore, the monetary requirements in the settlement program, especially regarding Pfizer's responsibility to fund surgical procedures and related medical care of those recipients who have their valves replaced, may have been substantially different had complete information about the detection device been disclosed earlier since the necessity of performing explant surgery is likely to be greater now."

42. Mr. Capretz then requested that defendants do *now* what they failed to do at the Fairness Hearing -- disclose the full *truth* about the new diagnostic technique:

> "On behalf of all surviving Shiley heart valve recipients and their families, we implore

Shiley and Pfizer to fully and accurately disclose all relevant information they have concerning studies, tests and devices, and all other matters relative to the discovery of incipient fractures of the Bjork-Shiley convexo-concave heart valve. It is appropriate to question why the news of the breakthrough of successfully developing a viable fracture detection device, and the disclosure of a multi-million-dollar, confidential settlement, if brought to light right after the U.S. District Court in Cincinnati approved the class action settlement.

"It has been suggested to me at [sic] Affidavit that the final settlement of the class action suit should be reviewed by the court on behalf of the heart valve implantees to see if it still meets the court's requirement of being, 'fair, adequate and reasonable,' before the Cincinnati class action settlement is upheld. The court should be furnished complete and updated information on both the status of the research and work on the detection device, and on the recently disclosed Minnesota settlement.

43. Movants join in Mr. Capretz' request for defendants to come forward with the truth, and they ask this Court to require defendants *and* Mr. Chesley to *fully* respond to three charges with *sworn* evidence.

44. In the August 19, 1992 Order, at p. 40, the Court stated:

"The Green firm suggests that class counsel

> should be enlarged to include attorneys who have experience in litigating heart valve cases. The Court understands that class counsel has followed this suggestion and has now added as affidavit... Kasdan and Capretz, as well as other attorneys with substantial experience in heart valve litigation. Therefore we conclude that Mr. Chesley, *along with Special Counsel*, is indeed qualified to serve as class counsel." (Emphasis added.)

45. The Court's earlier reliance on the expertise of Mr. Capretz should make his views worthy of the Court's respect, now that he challenges what went on during the Fairness Hearing.

46. The proponents' willingness to mislead the Court about the settlement's funding of diagnostic techniques and research ("Research Fund") that will supposedly benefit the class has continued beyond the date of the Court's judgment approving the class and settlement.

47. At the in-chambers conference held on December 28, 1992 this Court itself raised the issue of the Beaumont diagnostic techniques. The conference was attended in person by Mr. Chesley for the class and William H. Hawkins, III, Esquire for defendants; and Messrs. Wapner and Green for objectors, and Alan Goot, Esquire and John Frazier, Esquire for defendants, participated by telephone. ("12/28 conference").

48. The 12/28 conference was transcribed.

49. After a discussion of matters that pertained to the proposed (but ultimately unsuccessful) resolution of the objections through the Sixth Circuit's mediation program, the Court, *sui sponte*, raised the issue of the stories relating to Beaumont that had appeared in *The New York Times* and the *Wall Street Journal*, stating at N.T. 12/28/92 N.T. 10:

THE COURT:

"What I'm interested in is now something that is unrelated to the settlement [of the objections]. I'm concerned about what I read in *The New York Times* and the *Wall Street Journal* about the fact that there was research going on at the time the settlement [of the class action] was made that the Court was not apprised of, that the Pfizer people knew about and didn't advise the Court of, which may have a strong bearing on whether or not there is a device, a non-invasive device, by which they can determine if the valves that are in some of these people are defective."

50. The Court asked Mr. Chesley the very pertinent question: "Did you know about it [the Beaumont project] ... before - at the time all this was going on?" (N.T. 12/28/92 at 10-11).

51. Mr. Chesley attempted to confuse the issue, and to create the impression that the facts of the Beaumont diagnostic technique, mentioned in *The New York Times* and *Wall Street Journal*, had in fact been presented adequately to the Court. However, apparently sensing that the Court was not about to look kindly on having been mislead by the proponents, Mr. Chesley first tried to hedge his culpability for withholding crucial information from the Court. Hence, Mr. Chesley equivocated when he responded to the Court's direct inquiry, saying, "Yes, we knew. We did not know the full extent of it." (N.T. 12/28/92 at p. 11).

52. As is his wont in addressing this Court, Mr. Chesley proceeded to confuse the meaning of what he had said originally, and he then told the Court: "I'm satisfied, Your Honor, that I was apprised of it as far as the full details and the implications..." (N.T. 12/28/92 at p. 11).

53. Mr. Chesley made a dubious "factual" presentation to the Court about the *Beaumont Research Project* (much of which was repudiated by reports emanating from the Beaumont researchers). Thus, Mr. Chesley stated to the Court, with the purpose of having the Court rely on his statements, the following:

(a) Mr. Chesley, at the 12/28 conference, sought by the use of false statements to minimize the size and status of the Beaumont effort. He said to the Court:

> 'The "Beaumont study ... is a very, very small study which had been going on that was...that was at that time very premature...."[17] (N.T. 12/28/92 at

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[17] Mr. Chesley's statement that this was a "very, very small study" does not find any support in the truth. In fact, *The New York Times*, in the October 1, 1992 article pointed out that the study was intense and large, especially after the diagnostic technique was found to work in the winter of 1991, and Pfizer got permission from the FDA to do a 300-patient study at Beaumont Hospital. This was hardly a "very, very small study."

If Mr. Chesley's use of the words "at that time" refers to the period during the Fairness Hearing, his testimony that the study was "very premature" is likewise belied by the newspaper stories. It is worth recalling the opinion of a leading expert, as reported in the November 9, 1972 [sic] *New York Times*.

> "Dr. Arthur Caplan, director of the Center for Bioethics at the University of Minnesota said now that it had been demonstrated that the method worked, it makes it mandatory that they [Pfizer] make the technique available to those who have a Shiley valve in their chest."

Moreover, it is worth noting also, as described above, the Pfizer/Shiley researchers at Beaumont were "chafing at the bit to

p.11)

(b) During the 12/28 conference, Mr. Chesley sought, but the use of false statements, also to denigrate the Beaumont diagnostic technique and make it appear that the technique was not safe. He said to the Court:

> "[I]t takes very, very high radiation levels. In other words, the radiation level for a person to have that process was equal to a hundred chest x-rays.[18] (N.T. 12/28/92 at p.

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report their achievements," but Pfizer/Shiley made them agree as a "condition of participating" that "Shiley would decide when their findings could be announced," and Pfizer held up the announcement, in part, due to the "legal...aspects to consider." *The New York Times*, 10/1/92; *see also* discussion in this section at ¶¶ 8-20.

Accordingly, Mr. Chesley's remarks to the Court about the Beaumont study's "premature" status should be viewed as disingenuous, at best.

[18] In his statement to the Court, the self-appointed physician, "Doctor" Stanley M. Chesley grossly overstated the medical risks. Indeed, as seen in Exhibit C (attached), William with. O'Neill, M.D., F.A.C.C., the director of defendants' own Beaumont group wrote to class members and stated in October of 1992,

> "The Shiley Heart Valve Research Center (SHVRC) now believes, based on laboratory testing, that recently developed x-ray and sound technologies may be helpful in determining the physical condition of individual Bjork-Shiley

11).

(c) Mr. Chesley attempted by the use of false characterization, to distinguish the diagnostic technique developed at Beaumont from the diagnostic technique that is contemplated as being developed by the class settlement funds (*i.e.*, the *Research Fund*). He said to the Court:

> "That (Beaumont) research is in its infancy and that has nothing to do with our research, other than the fact we may borrow

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> convexo-concave heart valves.
>
> ***
>
> "The x-ray examination will be similar to that used for other cardiac diagnostic studies, but no contract or dye will be injected *and the x-ray exposure will be less* than you would receive from a conventional catheterization study." (Emphasis added.)

It is highly important, when weighing the credibility of the statements made to this Court by the proponents, that Mr. Chesley, with three lawyers for Pfizer participating in the conference, represented as a *fact* to the Court that the Beaumont diagnostic technique was "equal to a hundred chest x-rays" on December 28, 1992; but in the letter sent out two months earlier by Dr. O'Neill to class members, Dr. O'Neill said that the diagnostic technique would require less x-ray exposure than a "conventional catheterization study." What kind of game do the proponents think they are playing? Radiologists would all agree that a chest x-ray presents a much greater exposure to radiation than a conventional catheterization. *Dr. Chesley* therefore must be required to explain at a contested hearing, how his misstatement fit, with his role as class counsel.

> that research, you know, the protocol -- the supervisory panels may be able to borrow that research." (N.T. 12/28/92 at p. 11)[19].

54. The Court at the 12/28 conference showed the fist signs that it was beginning to detect that the proponents had carefully orchestrated the Fairness Hearing to *withhold* from the Court a useful and truthful account of the Beaumont research and the real status of the Beaumont diagnostic technique. The Court complained at the in-chambers conference, (N.T. 12/28/92 at p. 12)

> THE COURT: "I have no recollection of any of this being revealed to the Court."[20]

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[19] This example of Mr. Chesley's circumlocution and duplicity falls of its own weight. As noted, at the time of the Fairness Hearings, the Beaumont research was neither "premature," nor in its "infancy." Moreover, the statements of Pfizer's counsel, Mr. Klingsberg (at N.T. 6/5/92, pp. 163-164), as well as the affidavit of Dr. Sacks [sic] (see ¶¶ 22-26 in this section, *supra*) contradict Mr. Chesley's representations to this Court that the Beaumont research and diagnostic technique "has nothing to do with our research."

[20] Mr. Chesley's response to the Court's complaint was both inaccurate and misleading. He said (N.T. 12/28/92 at pp. 12-13)

> "MR. CHESLEY: There was a statement in the transcript, and I don't have it in front of me, Your Honor, in which they indicated that there was an ongoing study in Michigan. I was familiar with it. And we will dig it out of the transcript and be prepared to discuss it with the Court.

Apparently, Mr. Chesley has his own transcript, which differs from

55. This Court recognized at the 12/28/92 conference that the question of the Beaumont diagnostic techniques tends to establish that the settlement may not be adequate. The Court stated that at the in-chambers conference (N.T. 12/28/92 at p. 20)

> THE COURT: "*Wall Street Journal* did not have accurately what the settlement was in this case, but I think it's important that they seized on something that would indicate that the settlement would be ***inadequate*** unless it's clear that the research fund is not a closed fund; it's an open-ended fund." (Emphasis added.)

56. The Court has also made a statement which, by interpretation, could lead to the conclusion that the Court approved the settlement based on the erroneous belief fostered by the proponents) that the settlement provided for an open-ended research and that would be adequate to cover the costs of implementing the diagnostic techniques. The Court stated (N.T. 12/28/92 at 19),

> "I want to make it absolutely clear that Pfizer should understand the research amount is an open-ended amount, that is not a closed $75 million, or whatever it is. It's open-ended for

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the official transcript provided by the court reporters. If Mr. Chesley is referring to the Sacks [sic] Affidavit, or the Klingsberg *cover-up* presentation, Mr. Chesley would probably be best advised to quit while he is ahead. One would expect this Court to not look at those *statements in the transcript* as being either honest or informative.

> a lot of reasons, and it might be because of this Beaumont study, and that is what I want to find out about.[21]

57. The Court also, by implication, has endorsed having the very hearing that this motion requests. The Court said, in response to Mr. Chesley's suggestion of a meeting to discuss the Beaumont diagnostic techniques and the impact on the class settlement (N.T. 12/28/92 at p. 12).

> THE COURT: "I don't think it should be a meeting. I think it should be a hearing to determine whether it [the disclosure of the Beaumont diagnostic techniques] has an affect to modify the terms of the settlement."

58. Not only would be a disservice to the class to allow the class settlement to stand without the development of a record, as requested by this Rule 60(b) motion, but it also would be an embarrassment to this Court if the newspapers should report any other facts (concerning the adequacy of the class settlement) before this Court had an earlier opportunity to explore those facts. Surely it is not appropriate for this Court to have to depend on *The New York Times* and the *Wall Street Journal* to learn the *truth* about the adequacy of the class settlement.

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[21] As discussed earlier in this section, at ¶¶ 31-32, the settlement specifically does *not* provide an "open-ended amount." On the contrary, the research fund is heavily burdened, is capped at $75 million or *less*, and is formed from contributions of only $6.25 million per year (after an initial deposit of $12.5 million).

G. The proponents appear to have misled the Court and the class about defendants' unwillingness to settle "pre-fracture" cases for substantial sums.

1. Defendants, through their attorney Mr. Klingsberg, attempted to shape this Court's view that the class members would have no chance of winning if they attempted to litigate their case to verdict, citing the often repeated statistic of 21 motions granted in defendants' favor.[22]

2. Mr. Klingsberg went beyond the records in other courts; rather, in his presentation, he also convinced the Court, through what now appears to be a somewhat less than candid statement, that the claims of the class members had absolutely *no settlement value*, except for the *charity* offered by defendants here in the *Bowling* case.[23]

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[22] But, *see*, Exhibit "A," opinion letter of Professor Oscar S. Gray, which establishes that almost all of these jurisdictions which granted summary judgment in or dismissal of products-liability-based cases would uphold a *properly articulated* cause of action based on fraud, especially in light of evidence that became available after the Congressional subcommittee chaired by Representative Dinget reached the conclusion of defendants' fraud based on evidence defendants produced for Congress (which defendants had generally been successful in keeping out of the proceeding where their motions had been granted).

[23] During the June 9, 1992 session of the Fairness Hearing, at N.T. 6/9/92, p.5, Mr. Klingsberg said in open court:

> "And, thirdly, it has been the company's consistent policy throughout not to settle cases involving working valves where the suits are simply for emotional distress over the fact that the

3. Notwithstanding Mr. Klingsberg's unequivocal statement of defendants' "policy" of an *absolute* refusal to settle cases involving "working valves," it now appears that during the time of the Fairness Hearing, defendants intended to commence or already were involved in, negotiations and an agreement to settle "working valve" cases for sums of about $100,000 per plaintiff.[24]

4. Newly discovered evidence, and another example of the proponents' program of misleading rhetoric is found in an article which appeared in the *Los Angeles Times* on October 17, 1992 (a copy of which is attached hereto as Exhibit "E").

5. The *Los Angeles Times* reported the following:

(a) The Minneapolis law firm of Robins, Kaplan, Miller and Ciresi, through Bruce Finzen, Esquire was

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valve might at some time have some risk of failure.

"However, there was one case in which the valve did not fracture which was settled and that involved very unique terms of this one case out of some 500 cases, a unique litigation situation and, again, we would be prepared to supply that information to your Honor in-camera."

[24] Interestingly, Mr. Capretz in a letter dated April 30, 1992 to defendants' counsel, Kenneth R. Feinberg, offered to settle the claims of his firm's 304 "pre-fracture claimants for the almost identical sum of $100,000 per client" (see Exhibit "S" of the Capretz Appendix of Exhibits to Application for award of attorneys' fees). Mr. Capretz opted out his 304 working-valve clients and presumably, they will get the same deal the Finzen clients will enjoy. (See, discussion that follows.) Meanwhile, in the settlement that this Court approved, the class members will each get about $96,000 fewer dollars than those who opted out.

negotiating a $31 million settlement on behalf of many persons with *working valves*, including non-California residents.

(b) Finzen's 341 clients elected to opt out of the Bowling settlement.[25]

(c) During the time of the Fairness Hearing, the "negotiations" with Mr. Finzen had apparently progressed to the point of a written "escrow agreement" where Pfizer was to place $31 million plus interest in a Norwest Bank account of Finzen's law firm.

(d) The $31 million settlement fund was to be released pending approval of defendant Pfizer's board of directors.

(e) Defendant Pfizer admitted to the reporter for the *Los Angeles Times*,

> "[W]e have been negotiating with Robins, Kaplan, Miller and Ciresi firm on all of their cases and claims... The goal of such settlement negotiation would be to put all of the Robins, Kaplan claims behind the company."

(f) The *Los Angeles Times* reported further,

> "The settlement, the source said, classifies recipients according to whether they live in California, elsewhere in the United States or in other

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[25] The record shows that Mr. Finzen's clients did indeed opt out of the *Bowling* class. Moreover, subsequent newspaper stores reported that Mr. Finzen's deal was finalized.

countries."

6. A settlement in the magnitude of $31 million for the 341 persons represented by Mr. Finzen, which by October 17, 1992, had already reached the point of a written "escrow agreement," raises the serious question of how far these settlement negotiations had progressed prior to the Court's September 6, 1992 Order, and what offers of settlement defendants had made to any of Mr. Finzen's firm's clients at the time that Mr. Klingsberg was telling this Court about defendants' "no settlement policy."

7. If defendants or Mr. Chesley had properly informed this Court at the Fairness Hearing of defendants' offer to settle *working valve* suits for *six-figure* sums, it is doubtful that the Court would have concluded that the settlement "is a good deal for the class" (Order, 8/19/92 at p. 68). [26]

8. The newly discovered evidence of Mr. Finzen's settlement demonstrates further that Movants were justified when they contended previously that Mr. Chesley failed to hold out for a better and larger monetary recovery for the class members. (It is worth repeating here that the Special Counsels have opted out many of the private clients that they represent.)

9. Special Counsel James Capretz, as evinced by his 11/6/92 news release (*supra* at Exhibit "D") seems to

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[26] The class members should not be forced to take $2,500 as their full monetary recovery merely because they were represented by Mr. Chesley and not by a trial lawyer such as Mr. Finzen. The only reason the class members got Mr. Chesley is because this Court picked Mr. Chesley as their lawyer. What would the Court's view of this settlement have been if Mr. Chesley's 11/19/91 in-chambers meeting had taken place *after* Mr. Finzen's settlement had been made public?

agree with Movants. Mr. Capretz had the following to say about the Finzen settlement:

> (a) "The Finzen settlement may have a significant impact on the fairness of the *Bowling* settlement agreement, approved by this Court.
>
> (b) "Also disturbing is the amount apparently being paid to certain implantees who were not part of the class action settlement. Shiley and Pfizer have evidently entered into a separate confidential agreement-in-principal [sic] with a Minnesota-based law firm representing several hundred Shiley heart valve recipients who have filed stress and anxiety claims against Shiley and Pfizer. These recipients had opted out of the Cincinnati settlement.
>
> (c) "The settlement of the class action suit in Cincinnati, a process in which Shiley and Pfizer played a leading role, was intended to establish an equitable standard for treatment of all surviving Shiley convexo-concave heart valve patients. However, under the reported confidential arrangement, Shiley and Pfizer have agreed to pay the recipients represented by the Minnesota law firm substantially more money than what will be paid to kindred valve recipients under the Cincinnati settlement agreement.
>
> (d) "If Shiley and Pfizer have agreed to pay in the six-figure range to each U.S. recipient of the Minnesota settlement, and, concurrently, pay approximately $4,000 to each of the implantees who were part of the Cincinnati class action suit, it is reasonable to question the adequacy of the class action settlement. The existence of the separate, confidential Minnesota settlement raises questions about the fairness, adequacy and reasonableness of the class action settlement since the claims on behalf of the class action participants obviously have a much

greater significance in terms of risk and cost factors for Shiley and Pfizer than what was presented to Judge Spiegel.

(e) "In our opinion, the settlement information relative to the confidential agreement should be furnished to the reviewing federal court to assist it in making its determination of the fairness of the class settlement."

Id., Capretz press release 11/16/92.

10. As noted above, this Court has entered an Order appointing Mr. Capretz as Special Counsel and has stated that it was Mr. Capretz' expertise which helped make Class Counsel adequate under Fed.R.Civ.Pro. 23(a)(4). (*See*, Order, 8/19/92 at p. 40.)

11. Accordingly, it seems just that the lack of fairness in the Bowling settlement, as articulated in this Motion, and echoed by Special Counsel Capretz, are ample justification for the Court to grant this Motion.

H. The proponents mislead the Court about whether California's courts would allow persons with heart valves in other states to sue defendants in California to obtain the benefits of *Khan*.

1. During the Fairness Hearings, Movants argued that the Sixth Circuit's interpretation of the law would require this Court to apply California substantive law to the class claims.

2. Proponents in their briefs and in the presentation of Professor Miller (N.T. 6/5/92 at 77-79) stated to the Court that California courts had and would "close the door" on cases brought by Americans who lived outside of California.

3. Proponents misstated the holding and import of *Stanquik v. Shiley, Inc.*, 54 Cal.3d 744, 819 P.2d 14 (1991)

and other cases to support their argument.

4. It appears that as the result of the proponents' presentation, this Court accepted as accurate their argument that California courts would "close the door" on the claims of class members and thus stated at footnote 19 in the Court's Order of August 19, 1992.

> "It seems particularly inappropriate to apply California law to the proposed class as the Green firm maintains, in light of the fact that California has refused to apply its law to certain out-of-state plaintiffs."

5. There were counsel from California who originally were prepared at the Fairness Hearing to dispute the proponents' skewed presentation of California law, but they quickly became co-opted into the proponents' camp, withdrew their objections, and sought the title of special counsel. Therefore, although some of the lawyers (including Mr. Klingsbeg) [sic] who participated in the Fairness Hearing knew of certain crucial, but then-still-unreported decisions of the California courts which were helpful to the class members; but none of these cases were mentioned.

6. In fact, the ruling of the California courts, at the time of the Fairness Hearing, was that Americans (as opposed to foreigners) who resided outside of California could sue defendants in California's courts under *Khan*. Thus, approximately 30,000 class members could have had the benefit of California law applied to their cases.

7. In *Moore v. Shiley, Inc.*, Orange County Superior Court, 63-48-89, Cors. Case 50-52-48 911/234/92), *writ of mandamus and stay denied*, Cal. Ct. Of Appeals, 4th Appellate District, Div. 3, case #60-13590 (12/30/92), the Court reaffirmed its *earlier* ruling that out-of-state Americans may sue defendants under *Khan*, in California. (*See*, Exhibit G, attached hereto for newspaper accounts of the history of the *Moore* case.)

8. It is significant that the *Moore* case supports Movants' argument that California law should have been used when the value of the class litigation claims was compared to the value of the settlement. Under *Moore*, 30,000 of the American class members could have expected to obtain the $100,000 plus type of settlements (discussed previously herein) which were offered to opt-outs. This class settlement is, on balance, thus not beneficial to the American-based class members; on the contrary, it merely serves to draw a line between the heart valve recipients who could get a large monetary settlement by opting out and those unfortunate victims who were assigned to Mr. Chesley's care and included in the *Bowling* class.

5. Obviously still additional information or evidence relating to this important issue has not yet been made public. If this Court grants the instant Motion, the Movants would pursue the issue in discovery and present the results to the Court to enable it to make a determination on how the near-criminal proceedings impact on the fairness of the class settlement.

6. Class Counsel knew or was bound to know of the status of the criminal and civil fraud proceedings, and defendants obviously knew about them.

7. Other members of the proponents' team may have known the facts. However, none of the proponents shared this material information with the Court.

8. Therefore, the Court's Order approving the class settlement was based on a skewed and tainted record.

J. Mr. Chesley appears to have misrepresented to the Court the extent of the documents and other material he had access to and reviewed prior to agreeing to the terms of the settlement.

1. The Court answered Movants' objection that

Class Counsel conducted inadequate discovery to properly settle this case by giving credence to the statements made by proponents in their written material, and in open court that Mr. Chesley had reviewed and had access to thousands of documents and discovery taken in other cases.[27]

2. Mr. Chesley stated also, as a *fact*, that he visited the California document depository maintained by defendants for the purpose of inspecting documents. This statement was made in Mr. Chesley's briefs as well as in open Court.

3. In Exhibits A and B filed along with Mr. Chesley's fee "Application," he includes a purported record of the time he spent on this case. These exhibits demonstrate that at no time did Mr. Chesley or anyone from his staff actually visit the document depository in California.

4. Such a visit to defendants' document depository would be necessary before Mr. Chesley could agree to the terms of defendants' settlement since Mr. Chesley took no

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[27] The Court stated in the Order of August 19, 1992 at p. 44,

> "[M]r. Chesley had access to public information available about the defendants' alleged misconduct."

The Court stated also,

> "Thus a fair and reasonable settlement may be negotiated where the plaintiffs had access to discovery in other cases and the results of government investigations prior to agreeing to the class settlement." *Id.*

This finding by the Court gave Mr. Chesley every benefit of the doubt; but as will be discussed, the Court now has evidence to show that Mr. Chesley was not entitled to such generosity by the Court.

depositions and in fact, reviewed no documents (according to his own time records). Mr. Chesley and the other proponents obviously knew how important a visit to defendants' document depository would have been to this Court's opinion on the fairness of the settlement, and they made a point of emphasizing that Mr. Chesley had in fact made such a visit. Mr. Chesley's time records and the time records for all of the attorneys on his staff demonstrate that Mr. Chesley's statement about a visit to defendants' document depository in California was indeed a misrepresentation and false.

5. Similarly, a review of Mr. Chesley's time records establishes that he at no time reviewed any documents pertaining to defendants' liability; and that he did not review any documents which would make him qualified to negotiate a settlement on behalf of a worldwide class.

6. Mr. Chesley's time records, as shown in Exhibits A and B to his fee "Application," demonstrate further that he began his settlement negotiations at least as early as September 4, 1991, and thereafter, concentrated on no subject other than settlement; at no time after that date did Mr. Chesley or members of his staff conduct any activities which would have made Mr. Chesley qualified to negotiate and/or accept the settlement that defendants offered.

7. Exhibits A and B to Mr. Chesley's "Application" demonstrate also that the settlement drafts were prepared solely by defendants' counsel.

8. Exhibits A and B to Mr. Chesley's "Application" establish further that little if no time was spent by Mr. Chesley's associate attorneys in reviewing documents; that virtually no time was spent in reviewing documents supposedly provided by defendants in discovery; and that when Mr. Chesley stated in his briefs in opposition to defendants' motion for summary judgment in October of 1991 that he had not undertaken merits discovery, he was being truthful.

9. Mr. Chesley's time records and the time records of his staff demonstrate conclusively that while the Court was willing to give Mr. Chesley a theoretical benefit of a doubt with regard to discovery available in other cases and/or public documents, Mr. Chesley never took advantage of that opportunity, and the Court was clearly mislead by the proponents into assuming that Mr. Chesley had in any way informed himself about the facts and liability pertaining to this class case.

10. Mr. Chesley's time records and those of his associate attorneys established further that prior to agreeing to defendants' settlement terms, none of them ever met with any experts in the field of manufacturing of heart valves or indeed, in the relevant medical disciplines which would have made Mr. Chesley sufficiently informed to negotiate this settlement, or to evaluate whether the amounts that defendants were offering were in any way reasonable before he accepted the terms defendants had offered. Thus, while the Court was willing to give Mr. Chesley the benefit of the doubt in this regard also, it now appears that the Court was too generous.

11. If and when the Court allows discovery of the matters raised by Mr. Chesley's fee application and exhibits, undoubtedly new evidence of the Court's over-generosity in giving Mr. Chesley the theoretical benefits of the doubt time and again will be established, and Movants reserve the right to supplement this Motion after, and assuming, that discovery relating to Mr. Chesley's fee application is allowed.

WHEREFORE, for the reasons set forth above, the PA Class Objectors respectfully request that the Court enter an Order: (a) Expediting consideration of this Motion; (b) Stating that if the case were remanded, the Court would open the record for consideration of the matters raised herein; © After a remand, allowing depositions, document production and other discovery relating to the matters raised herein; (d) After a remand, allowing an evidentiary hearing on the

matters raised herein; (e) Vacating the Order and Judgment entered on September 9, 1992 after the case shall have been remanded from the Sixth Circuit Court of Appeals; and (f) Providing whatever other relief is just and appropriate.

/s/
GARY GREEN
LARRY M. KELLER

MORTON B. WAPNER
Attorneys for Movants

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street 12th Floor
Philadelphia, PA 19106
(215) 574-0600

WAPNER, NEWMAN & ASSOCIATES
115 South 21st Street
Philadelphia, PA 19103-4433
(215) 569-0900

Dated March 1, 1993

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. 91-CV-256
	)	S. ARTHUR SPIEGEL,
Plaintiffs,	)	JUDGE
v.	)	
PFIZER, INC., ET AL.,	)	**MEMORANDUM OF LAW**
Defendants.	)	

1. Movants are entitled to relief from the settlement order of August 19, 1992 based on the revelation of newly discovered evidence.

Federal Rule of Civil Procedure 60(b) authorizes this Court to relieve a party from a final order when subsequently new evidence is discovered or where a party spoiled the record by fraudulent or improper conduct.

Because Movants have already filed a Notice of Appeal to the settlement order, it is necessary that Movants follow the procedure established by the Sixth Circuit in *First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (1976). There, the court framed the issue before it as: "Concerning the proper procedure which a party should follow when it seeks to make a motion under Rule 60(b) to vacate the judgment of the district court, after Notice of Appeal has been filed." *Id.* at 345.

"The proper procedure," stated the court, "is for [the

movant] to file his motion in the district court. If that court indicates that it will grant the motion, [the movant] should then make a motion in this court for a remand of the case in order that the district court may grant [the motion [under 60(b)]". *Id.* at 346. *See also, Flynt v. Brownfield, Bowen & Bailey*, 726 F.Supp. 1106 (S.D. Ohio, E.D. 1989).

The *Hirsch* court arrived at this procedure by following the teachings of *Herring v. Kennedy-Herring Hardware Co.*, 261 F.2d 202 (6th Cir. 1958), wherein Judge Miller, speaking for the Sixth Circuit, stated:

> The authority to grant a new trial under Rule 59(a) or to relieve a party from a final judgment under Rule 60(b), Rules of Civil Procedure, rests with the district court, not the court of appeals. In accordance with the procedure in an analogous situation, approved in *Smith v. Polin*, 90 U.S. App. D.C. 178, 194 F.2d 349; *see also: Metcalf v. United States*, 6 Cir. 195 F.2d 213, 218; *Hamel v. United States*, 6 Cir. 135 F.2d 969; appellant's motion seeking a new trial or relief from final judgment under either of those rules should be addressed to this district court. If after a full and careful investigation of the problem, the district judge is of the opinion that a fair and satisfactory record can be prepared for the purpose of a review of this case by the Court of appeals, or if the failure to prepare such a record is due to the inexcusable neglect of the appellant to preserve his rights in the matter or to his failure or refusal to fully cooperate, he will so state and the pending motion for a remand will be overruled. If, without fault on the part of

> the Appellant, or because of the failure of the appellee to fully cooperate in the matter, the District Judge is of the opinion that a record cannot be prepared and presented to the Court of Appeals which will fairly and satisfactorily able the Court to review the judgment entered in this action and that the appellant should be granted a new trial, he will so certify this court and the pending motion for a remand will be sustained for action by the District Judge on the motion under consideration by him.

Id. at 203, 204.

In *Mitchell v. OsAir, Inc.*, 629 F.Supp 636 (N.D. Ohio 1986), plaintiff Mitchell brought a Title VII action in district court against defendant employer, OsAir, Inc. At trial, judgment was found for defendant and Mitchell thereafter appealed to the Court of Appeals for the Sixth Circuit. While the appeal was pending, Mitchell filed a motion in district court seeking relief from the judgment on the grounds of newly discovered evidence. The district court "determined that it had no jurisdiction to consider the motion, because Mitchell's untimely motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e) was filed following a notice of appeal. Although the court indicated its inclination to grant Mitchell's motion under Rule 60(b) if were accorded jurisdiction through a remand by the Sixth Circuit, it denied Mitchell's motion". *Id.* at 639.

Following the procedure prescribed by the court in *Hirsch, supra*, Mitchell then filed a motion with the Sixth Circuit requesting a remand to enable the district court to rule on what it labeled as a "60(b) motion". The Sixth Circuit, determining that *Hirsch's* methodology had been complied

with, granted Mitchell's motion and remand... Mitchell's appeal." Thus, Mitchell's motion was properly before the district court despite the earlier noting of appeal.

The recent revelations described in the instant Motion shed new light on what was deemed by the Court as a fair and reasonable settlement. The truth is, the settlement is neither fair nor reasonable. In fact, this settlement is virtually hollow. As Judge Mikva cautions, Rule 50(b) was intended to preserve "the delicate balance between the sanctity of final judgments...and the incessant command of a court's conscience that justice be done in light of all the facts". *Good Luck Nursing Home, Inc. v. Harris,*636 F.2d 572,577 (D.C. Cir. 1980), *quoting Banker's Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), *cert. den.*, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 793 (1970).

This Motion seeks to avoid the preservation of a judgment arrived at without all the facts. Rule 60(b) is intended "to prevent the judgment from becoming a vehicle of injustice."[1] It is therefore "to be construed [sic] liberally to do substantial justice."[2]

Substantial justice requires, at the very minimum, an opportunity for all the facts to be laid before the court. Only then can the record show whether the settlement was achieved absent bad faith and deceit.

2. Movants meet their burden for obtaining reconsideration of the settlement order under RULE 60(b).

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[1] *United States v. Walus*, 616 F.2d 283, 288 (7th Cir. 1980).

[2] *Edgar v. Finley*, 312 F.2d, 537 (8th Cir. 1963).

In *Flynt, supra,* one of the threshold issues before the district court was whether the movant had shown sufficient grounds to warrant the court's consideration of the new evidence, forming the basis for movant's 60(b) motion. Preliminarily, the court noted that the burden is on the movant to show why the court should grant relief. Furthermore, "to merit relief under [rule 60(b)], the plaintiffs must show that the evidence by due diligence could have not been discovered in time to move for a new trial under Rule 59(b)". *Flynt*, 726 F.Supp at 1110. Lastly, notwithstanding timeliness or due diligence, the newly discovered evidence must have existed at the time of trial and additionally must be capable of altering the court's understanding of its original judgment, from which relief is now sought. *Id.* at 1112. In other words, the evidence must be sufficiently material to warrant the reversal of the district court's original holding. *Davis by Davis v. Jellico Community Hospital, Inc.*, 912 F.2d 129 (6th Cir. 1990).

In *Flynt, supra*, plaintiff client sued his attorneys and their firm for legal malpractice. Plaintiff's claim was ruled time-barred and a summary judgment was then entered against him. Plaintiff subsequently filed notice of appeal to the Sixth Circuit, but while the appeal was pending, moved the district court under 60(b) to reconsider its order in light of newly discovered evidence.

The evidence at issue pertained to certain documents indicating that the attorney-client relationship between plaintiff and defendants continued past the date of defendant's letter of termination. If true, plaintiff's action would not be time barred and summary judgment necessarily would be vacated. Relying on *Hirsch, supra*, the district court recognized its jurisdictional authority to hear to 60(b) motion, despite the pendency of appeal. Judge Kinneary said:

The pending appeal did not leave this court

> bereft of jurisdiction to consider the motion under rule 60(b) for relief from judgment. The scope of that authority, however, would be limited if the court were inclined to grant the motion. Nevertheless, the jurisdictional hurdle would not bar consideration of the merits during the pendency of the appeal, at least to the extent necessary to determine whether the court should issue a tentative ruling stating its inclination to grant the motion. If such an order is not appropriate given the meritlessness of the motion, the court may also weigh the merits in order to deny the motion.

Flynt, 726 F.Supp at 1109.

Although the district court eventually found Plaintiff's submission of evidence inadequate to justify granting of the 60(b) motion, the court nevertheless had to examine the evidence before arriving at this conclusion. Although the court found that plaintiff failed to exercise due diligence in that the "newly discovered evidence" had already been in plaintiff's possession at the time of trial, nevertheless, the court felt compelled to address the merits of the motion and to issue an order which enabled the plaintiff to obtain a remand.

In the end, the court found that the documents did not "alter the court's understanding of the relationship between the parties..." and, therefore, the evidence did not merit relief from judgment. However, the significance of the court's decision is not in its ultimate ruling, but rather, in how it arrived there. Before determining whether it merits relief from judgment, newly discovered evidence first must be examined closely by the Court.

The evidence which now forms the basis for Movant's 60(b) motion was not available at the time of trial. Although such evidence was in existence at that time, Movants' counsel's diligent efforts to uncover it were stymied by the proponents' failure to disclose certain highly relevant information at the Fairness Hearing, the Court's refusal to permit cross-examination to discovery or even rule on the PA Class Objectors' motion to compel, and likewise by Mr. Chesley's failure to conduct diligently exhaustive discovery prior to settlement.

3. **Conclusion**

For the reasons stated above, the Court should grant this Motion.

/s/
GARY GREEN
LARRY M. KELLER

MORTON B. WAPNER
Attorneys for Movants

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street 12th Floor
Philadelphia, PA 19106
(215) 574-0600

WAPNER, NEWMAN & ASSOCIATES
115 South 21st Street
Philadelphia, PA 19103-4433
(215) 569-0900

EXHIBIT "A"

600 West Baltimore Street, Baltimore, Maryland 21201
208-338-7174

October 3, 1992

Gary Green, Esq.
Sidkoff, Pincus & Green
Twelfth Floor
530 Walnut Street
Philadelphia, PA 19106

Dear Mr. Green:

There follows a draft of a letter that could send or modify if it would be of help to you for me to do so.

Please call me if you have any comments or suggestions.

I have not included anything about my qualifications. Should I do so? (It feels awkward to toot my own horn.) The relevant information, most of which you already know, is that I am a Professor of Law at the University of Maryland, where I have taught torts for over twenty years; a co-author of a standard casebook on torts, H. Shulman, F. James and O. Gray, Cases and Materials on the Law of Torts (Foundation Press, 3d ed. 1976); a co-author of a leading treatise on torts, F. Harper, F. James and O. Gray, The Law of Torts, (Little, Brown and Co., 2d ed., 1986); and an Adviser for the American Law Institute's Restatement Third of Torts: Products Liability. I have long had a particular similarly interest in the law of fraud: e.g., James and Gray, Misrepresentation, 17 Maryland Law Review 386-322, 488-

543, 1977-1978).

With best regards,

Sincerely yours,

/S/_____
Oscar S. Gray

OSG/sks
cc: Morton B. Wapner, Esq.
Attachment: Draft Opinion Letter

600 West Baltimore Street, Baltimore, Maryland 21201
208-338-7174

October 16, 1992

Gary Green, Esq.
Sidkoff, Pincus & Green
Twelfth Floor
530 Walnut Street
Philadelphia, PA 19106

Re: Bowling v. Pfizer

Dear Mr. Green:

You have asked my opinion concerning one aspect of the proposed settlement in the referenced case: the contention advanced by proponents of the settlement that plaintiffs whose heart valves have not yet malfunctioned would have poor prospects of recovering tort damages in litigation.

To the extent that this reflects an assumption that physical malfunction of the product is an essential predicate for a fraud action, I do not agree. It seems quite clear that a fraud action can be based simply on a difference in value between a product that conforms with representations and one that culpably does not. (See generally Restatement (Second) of Torts, ch.22.) Whether such a difference can be established in the present case I do not know, but, in the light of the allegations of some plaintiffs, and in the absence of substantial discovery to the contrary, I would consider it rash to assume that it cannot be done.

Plaintiffs, for instance, contend, I understand, that the manufacturer lied to the Food and Drug Administration and

EXHIBIT A

to the medical profession about the reliability of its manufacturing process and the soundness (and hence, propensity to failure) of its products; that the products would not have been approved by the Food and Drug Administration as safe and effective if the truth as it was known had been told; and that the FDA ordered the products off the market when it learned the truth.

If, when the valves were sold, they had not been approved by the FDA, they would, of course, have had no value. If, accordingly, the misrepresentations to the FDA and to the medical profession were deemed to constitute a fraud upon the consumer, which seems entirely plausible, each purchaser could be entitled, inter alia, to the difference between the value of what he had received in the transaction and its purchase price" Restatement Second) of Torts §549(1)(a); "The value of the article is normally determined by the price at which it could be resold in an open market or by private sale if its quality or other characteristics that affect its value were known". *Id.*, Comment c; emphasis added). None of this depends on the actual malfunction of the product; the entitlement to compensatory damages in fraud is complete based on the difference in value between the price of the product as falsely promoted, and what the value would have been (viz., zero, for lack of FDA approval) if the product had been truly presented.

Upon a showing of a material difference in value, blank, or in some jurisdiction, upon a showing of even a nominal difference in it would furthermore become possible to claim consequential and even punitive damages.

Consequential damages for fraud can include damages for emotional harm, in cases where the circumstances indicate the likelihood of such harm, and where a normal commercial measure of damages is not suitable or adequate. This has been recognized in a variety of fraud cases throughout the county, in about half of the jurisdictions that have discussed

the question (including Ohio), and nor merely in California heart valve litigation. See, e.g., Holcombe v. Whitaker, 294 Ala. 430, 318 So.2d 289 (1975); Kathleen K. V. Robert B., 150 Cal. App.3d 992, 198 Cal. Rptr. 273 (1984); Trimble v. City and County of Denver, 697 P.2d 716, 730 (Colo. 1985); Kilduff v. Adams, Inc., 219 Conn. 314, ___, 693 A.2d 478, 484 (1991); Food Fair, Inc. v. Anderson, 382 So.2d 150, 154-155 Fla. App. 1980); Captain & Co. V. Stenberg, 505 N.E.2d 88, 100 Ind. App. 1987); Ditcharo v. Stepakek, 538 So.2d 309, 314 (La. App. 1989); Crowley v. Global Realty, Inc., 124 N.H. 814, 474 A.2d 1056 (1984) ("liberal compensatory damages" allowable for "emotional distress" in fraud action in appropriate circumstances, in lieu of punitive damages); Burr v. Board of County Commrs. Of Stark County, 23 Ohio St.3d 69, 77, 491 N.E.2d 1101, 1108 (1986); Kneip v. Unitedbank-Victoria, 734 S.W.2d 130, 136 (Tex. App. 1987); McRae v. Bolstad, 32 Wash. App. 173, 178-179, 646 P.2d 771, 775-776 (1982) aff'd, 101 Wash.2d 161, 676 P.2d 496 (1984). Some of these courts require that emotional distress have been a foreseeable consequence at the time of the fraud, but this does not appear to present a problem for the heart valve claimants. The foreseeability of fear, indignation and other emotional distress from the knowledge that a heart valve that has been implanted in one's chest is more likely to fracture than had been anticipated at the time it was implanted, and that this risk would have been avoided had the manufacturer not lied about the product, is reasonably evident, and would certainly be at least a permissible inference for a jury.

Defendants seem to have emphasized in their arguments an assertion that the availability of recovery in fraud for emotional distress in the absence of physical failure of the heart valve is supportedly by onlyone California case, Khan v. Shively, Inc., 217 Cal. App.3d448, 266 Cal. Rptr. 106 (1990), and that a large number of heart valve cases have

decided the contrary.

On the contrary, an indicated above, the California case is completely consistent with mainstream American fraud doctrine in two respects: first, with the principle that liability does not turn on product malfunction, as contrasted with diminishment of the value of a product; and second, with an important body of emerging law on the availability of emotional damages for fraud, which is by no means limited to California.

By contrast, the heart valve cases which defendant has won are, with only one dubious, unreported exception, not fraud cases. They are product liability cases.

In product liability, as in negligence, there are doctrines that inhibit recovery for emotional distress in the absence of malfunction of the product, but those doctrines are, for good reason, inapplicable to fraud claims.

One of such doctrines is the "impact rule" and its progeny. Under this doctrine, there was formerly no liability in negligence -- or, a fortiiori, no no-fault or strict liability -- for emotional injury alone, in the absence of antecedent bodily injury or, at least, physical contact with something external to the victim.

That doctrine should be distinguished from the assumption that physical injury from product failure is a necessary prerequisite to an emotional injury claim for fraud in several respects. First, the impact rule and its progeny never applied to intentional torts. A classic example is the tort of assault. Another, more recent, is the tort of intentional infliction of emotional distress. A third is fraud, which typically arises in commercial injury and other non-accident contexts. See the fraud cases cited above; In re Johnson, 120 B.R. 461, 468-469 (N.D. Ind., Bkr., 1990). Second, even in negligence (and strict liability), the impact rule did not apply where emotional harm was not the only tort damage suffered, but was instead parasitic to other tort damages (as is the case

in the fraud claims here). Beyond these distinctions between negligence and fraud, it should be noted that; even in negligence and strict liability, the impact rule has been abandoned in most jurisdictions in modern times. In some it has been replaced by other doctrines that tend to limit the availability of emotional damages, e.g., that there be physical injury consequent upon the emotional harm[1] or that the emotional harm be evidenced by objective physical manifestations.[2] Even in such jurisdictions, however, there is no requirement based on the impact rule or its progeny that there be antecedent physical injury as a general principle of negligence law, much less fraud. Accordingly, there is no need for product failure for purposes of establishing such antecedent physical injury.

Another product liability doctrine that has confused

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[1] E.g., Brown v. Cadillac Motor Car Div., 468 So.2d 903 (Fla. 1985); Payton v. Abbott Labs., 386 Mass. 540, 437 N.E.2d 171 (1982).

Contra: Taylor v. Baptist Med. Center, Inc., 400 So.2d 3699 (Ala. 1981); Morris v. Hartford Courant Co., 200 Conn. 676, 513 A.2d 66 (1986); Williams v. Baker, 572 A.2d 1062 (D.C. 1990); La Fleur v. Mosher, 109 Wis.2d 112, 365 N.W.2d 314 91982) (physical injury not necessary where nature of tort provides "guarantee that the claim is probably genuine").

[2] E.g., Ferrara v. Galluchio, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249 (1958); compare Bovsun v. Sanperi, 61 N.Y.2d 219, 231, 473 N.Y.S.2d 357, 363, 461 N.E.2d 843, 849 (1984).

Contra: Corgan v. Meuhling, 143 Ill.2d 296, 158 Ill. Dec. 489, 574 N.E.2d 602 (1991); Cuibert v. Sampson's Supermarkets Inc., 444 A.2d 433, 437 (Me. 1982); St. Elizabeth Hosp. V. Garrard, 730 S.W.2d 649 (Tex. 1987).

the analysis in the present case is a widespread rule that in negligence or strict liability), there is no tort liability if the only harm suffered is fear of future injury (but damages for such fear are recognized if tort liability can be established based on some other harm). Fear of future harm alone, in other words, is not sufficient to establish a tort (in negligence or strict liability), but is a permissible element of damage for a tort otherwise established.[3] Here the difference between a product liability claim (whether in negligence or strict liability) and a fraud claim is plain. In negligence or strict liability there is generally no tort if the only harm suffered, apart from fear of future injury, is in connection with the value of a product, because in negligence and strict liability it is generally -- but not always[4] -- the rule that there is no liability for pure economic loss. But in fraud there is virtually always liability for pure economic loss -- although there can also, of course, be fraud liability in a non-commercial context. So, in the absence of antecedent physical failure, there is no tort in negligence or strict liability to support a claim for fear. In fraud, by contrast, the tort is complete, without the emotional distress claim, on the basis of economic loss alone, and emotional distress is accordingly an entirely conventional element of damages for the tort.

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[3] E.g., Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985); Mauro v. Raymark Indus., Inc., 116 N.J. 126, 561 A.2d 257 (1989).

[4] In some jurisdictions there can be product or negligence liability for pure economic loss if it arises from the risk of physical injury (like a defective heart valve). See, e.g., Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 308 Md. 18, 517 A.2d 336 (1986); Russell v. Ford Motor Co., 281 Or. 587, 575 P.2d 1383 (1978).

Sincerely yours,

/S/_____
Oscar S. Gray

OSG/sks

EXHIBIT "B"

A12 *The New York Times* **NATIONAL** NOVEMBER 9, 1992

Method Found To Spot Defect In Heart Valve

By GINA KOLATA

In a four-hour operation on Nov. 1, surgeons at a Michigan hospital removed an artificial valve from the heart of Marion F. Genteman, a 72-year-old retired metallurgist. Afterward, when the surgeons held up the valve to a magnifying glass, they saw a tiny crack.

This was the first confirmation of a new x-ray method that allows doctors to find hidden fractures in a type of heart valve that has been implanted in 65,000 people around the world.

The heart valves, made by Shiley Inc. Of Irvine, Calif., have a tendency to break apart suddenly, killing people within minutes to hours. But most patients have been afraid simply to have the valves removed because the operation to replace them has a 5 percent mortality rate and costs about $35,000.

Search for Effective Test

In the past year, Shiley has supported a research program to discover a way to find failing valves before they catastrophically break. And now, it seems, the method works.

Mr. Genteman was the test case, the one that established the sensitivity of the new system, said the director of the program at William Beaumont Hospital in Royal Oak, Mich. Doctors there have used the system to detect and replace cracked artificial valves in two other patients, but it was not until they uncovered the problem in Mr. Genteman -- where the crack was far more difficult to detect -- that they

felt certain that the new technique worked.

These results are theoretically good news for the patients, including 20,000 Americans, who received the valves from 1979 to 1986, when they were removed from the market because of fears of failure.

But the emerging success of the new method poses a problem for Pfizer Inc., of New York, the owner of Shiley. To settle a suit filed on behalf of 50,000 Shiley patients and their families, Pfizer agreed to pay for screening tests and for the open heart surgery to remove cracked valves.

Financial analysts say the looming costs of finding and removing faulty valves will be a blow to the company's financial health, possible costing hundreds of millions of dollars.

Dr. William O'Neill of Beaumont Hospital, who is directing the experimental study that found the crack in Mr.. Genteman's valve, said the finding was "a strong testament to the technique." He added, "I think it is going provide enormous relief and peace of mind."

Unfortunately, however, preliminary data indicate that far more valves may be cracked than anyone expected, Dr. O'Neill said. He said that he and other participating in the research program expected to find three fractured valves in the 300 high-risk patients they planned to X-ray. But they have already found three cracked valves in the first 57 patients they examined.

Dimensions of Problem

"I'm stunned that we found so many fractures so quickly," Dr. O'Neill said. He said he expected "enormous pressure by the public" to make the test widely available as soon as possible and added that he expected to train doctors to set up about 10 screening centers across the United States.

In planning the study at Beaumont Hospital, the company identified patients it thought were at high risk because of "biostatistical data, manufacturing data and

statistical data in house," said Philip Hedger, president of the Shiley Heart Valve Research Center in Irvine. He declined to elaborate on what the company knew about which valves were most likely to break. "We had no expectations" of how many cracks were expected in the 300 patients, he added. In addition, he said, it is still possible that the three cracks found so far will be the only ones in the 300-patient test.

But Dr. Paul Meier, a statistician at the University of Chicago, said it was highly unlikely that no more cracks would be found because three out of 57 "reflects a rate that is certainly significantly greater than 1 percent."

Less Costly Method Sought

Mr.. Hedger, Shiley's president, said his company was trying to develop a much less expensive method to find cracks using ultrasound. The company is paying Dr. O'Neill $500,000 to screen the 300 patients in the experimental program. Even if the price dropped by half when the test became widely available, it would still cost close to $1,000 a patient. And each patient has to be screened twice a year.

"We are extremely anxious not to make patients believe there is a panacea," Mr.. Hedger said. "The problem is, we have 55,000 patients with this device and imaging them in the way we are doing at Beaumont would be entirely inappropriate for the majority of them." He added that most of the patients had "a very, very small risk" of fracture.

As for the screening procedure, Mr.. Hedger said, "I'm concerned that patients realize this is not benign. He said the procedure carried a risk of radiation exposure equivalent to that of a chest X-ray. For those patients who, according to the company, have a small risk of fracture, being exposed to radiation possibly twice a year for an indefinite period might do more harm than good, Mr.. Hedger said.

Dr. Arthur Caplan, director of the Center for Bioethics at the University of Minnesota, said now that it had been demonstrated that the method worked, "it makes it

mandatory that they make the technique available to those who have a Shiley valve in their chest. Period.

Ruinous Liability Cases

Dr. Caplan added that the arguments over who should be screened and when "take on a different flavor when what one is talking about is enormous potential liability, huge costs in terms of the number of people who need to be screened, a fair amount of proprietary interest in perfecting the technique and a huge corporate entity with very deep pockets sitting nervously in the background." For Pfizer, he added referring to major liability suits that were ruinous to top corporation, "this is Dalkon Shield II; it's asbestos II."

Mr. Genteman, whose heart's mitral valve was damaged from a bout of rheumatic fever when he was 12 years old, had his valve implanted in 1981, when his heart started failing. "I knew I had a Shiley valve," he said, "but I did not know there were problems with it until I saw a program about it several year ago on '20/20.'"

But he added that his doctor eased his fears after he had watched the television program. "I asked my cardiologists about it and he said these things are blown all out of proportion," he said.

Dr. O'Neill said that so far just Mr. Genteman and two other men had actually had their valves removed, which provided the ultimate proof of the method. The valves in the other two men, Elbert Pierce, 57, of Hebron, Ind., and a 70-year-old resident of Dearborn, Mich., who asked that he not be identified, had cracks so wide that they were not good tests of the new method, Dr. O'Neill said. At about four-thousandths of an inch, the cracks were visible to the naked eye and could probably be seen with x-rays, even without the special equipment at Beaumont, Dr. O'Neill said.

The X-ray method being tested by Dr. O'Neill arose from research at Shiley that indicated that the valves fail only after a long process. The valves consist of a disk attached to

a ring by two thin legs.

By studying valves that failed, valves that were removed from patients for other reasons and valves that were implanted in sheep to study their failure, researchers learned that the first step is a tiny fracture in one leg, where it is attached to the ring. The fracture grows until the leg completely breaks away from the ring. Then, months later, the second leg breaks away and the valve flies out of the heart, propelled by the enormous force of rushing blood.

Implications for Pfizer

With this understanding of valve failure, Shiley paid for research to find a way to detect microscopic fractures when they first appeared.

Financial analysts said the new test and its findings could represent a tremendous liability for Pfizer.

"What Pfizer has done is to open a Pandora's box," said Hamant Shah, an independent financial analyst in Warren, N.J. "Once they find a crack, they have to correct it, and that's pretty expensive." Mr.. Shah added that Pfizer has been an extraordinarily successful company, with several very lucrative drugs. But, he said, because of Pfizer's successes, analysists have paid little attention to the looming liability for the heart valve patients, "in my opinion, wrongly."

Mr. Shah added that he gave "a lot of credit to Pfizer for not ignoring the problem."

Neil Sweig, a drug company analyst with Capital Institutional Services in New York, said that although the valve would represent "a high level of expenditures," he believed that "Pfizer is large enough and successful enough to weather the storm."

Vulnerable Valve

The Bjork-Shiley replacement heart valve is a disk that swivels on two struts to control blood flow. The struts are vulnerable to fractures.

EXHIBIT "C"

Beaumont
William Beaumont Hospital
Royal Oak
Department of Medicine
Division of Cardiology

Dear Sir or Madame:

I have asked Medic Alert Foundation, International to send this letter to registered patients whose valve serial numbers indicate that they have a 29 mm or larger 60o Bjork Shiley Convexo-Concave (BSCC) Heart Valve, implanted as a replacement for their natural mitral valve.

As you may recall, some time ago you were sent (through Medic Alert Foundation, International) information regarding your artificial heart valve and the risk that your valve might experience a strut fracture. At that time you were told that joining the International Implant Registry would make it possible to provide you with the latest medical information about your BSCC valve. The Shiley Heart Valve Research Center (SHVRC) now believes, based on laboratory testing, that recently developed X-ray and sound technologies may be helpful in determining the physical condition of individual BSCC heart valves.

As with all new tests it is necessary to confirm that results in the laboratory apply to human patients as well. Therefore, the SHVRC is sponsoring a study of patients with large-size BSCC mitral valves to be conducted by the Division of Cardiology at the William Beaumont Hospital in Royal Oak, Michigan, a suburb of Detroit. I am contacting you to see if you would be interested in participating. The study will involve a history and physical examination, concentrating on your heart and artificial valve(s), an electrocardiogram and high-fidelity sound recordings. The X-

ray examination will be similar to that used for other cardiac diagnostic studies, but no contrast or dye will be injected and the X-ray exposure will be less than you would receive from a conventional catheterization study.

Because this is a very preliminary investigation the SHVRC and the investigators at William Beaumont Hospital can not assure you that they would be able to detect a problem in your valve, even if it would actually have one. However, if you choose to participate and the investigators find any reason to suspect that there is a problem with your valve, they will take careful precautions to be sure that the diagnosis is promptly confirmed, and that you and your personal physician are notified.

The SHVRC will pay all of your travel expenses. They will also pay for the examination, but they will not pay you to participate. I encourage you to discuss this offer to participate in the study with your doctor. If you or your doctor would like more information or if you are interested in being part of the study, please call (800) 452-2610 or (313) 551-4176.

Yours sincerely,
/s/
William W. O'Neill, M.D., F.A.C.C.
Director, Division of Cardiology

3601 West Thirteen Mile Road, Royal Oak, Michigan 48073-6769, (313) 551-4162.

EXHIBIT "D"

09:16 Statement by James T. Caprets, special counsel, Shiley heart valve class action settlement, regarding the need for Shiley Inc. And its parent, Pfizer Inc., to make full disclosures relative to the Shiley heart valve crisis.

IRVINE, Calif. -- (BUSINESS WIRE) --

NOTE TO EDITORS: In September, Judge S. Arthur Spiegel of the U.S. District Court in Cincinnati approved a settlement agreement stemming from a major class action suit brought on behalf of Shiley heart valve recipients and their families against Shiley Inc., and its parent, Pfizer Inc. Subsequent to the settlement agreement, which has been appealed, new disclosures relative to the Shiley heart valve situation have come to light that many participants in the settlement agreement, including Irvine, Calif. Attorney James T. Caprets, believe have a significant bearing on the settlement agreement and on its pending appeal. Caprets was appointed special counsel by Judge Spiegel to assist in implementation of the settlement program.

As an attorney representing approximately 100 recipients of the Bjork-Shiley convexo-concave heart valve, and also as a special counsel responsible for helping to implement the Shiley heart valve class action suit settlement program, I am concerned about the recent disclosures that I believe may have a significant impact on the fairness of the settlement agreement stemming from the class action suit heard in U.S. District Court in Cincinnati.

First and foremost is the disclosure that, through research funded by Shiley and Pfizer, a diagnostic system has been developed that evidently can detect microscopic flaws and "single-leg fractures" in the structure of heart valves that forewarn a potential for fracturing and eventual valve failure.

According to reports, the procedure was successfully used recently to detect a fissure in an implanted valve, and subsequently the defective valve was replaced before total fracture occurred.

The development of the new device, which utilizes computerized X-ray technology that greatly enhances the X-ray image of an implanted heart valve, could be very positive for the thousands of surviving Shiley heart valve recipients. I believe, however, information about this device should have been fully disclosed by Shiley and Pfizer during the discovery and testimony phases of the class action settlement hearings before U.S. District Judge S. Arthur Spiegel in Cincinnati this past summer. Even today implantees are unable to get complete and accurate information on the status of this important research.

Heart valve recipients were required to make the critical decision of either staying in as part of the class action suit, or opting out of the suit to pursue their claims individually. All valve recipients should have had at their disposal all relevant information concerning the heart valve, and that information certainly should have included the existence of the detection device. I believe it is quite reasonable to assume that some of the recipients who opted out of the suit may have instead decided to be part of the class action settlement had they known about the device and Pfizer's commitment to its funding. Furthermore, the monetary requirements in the settlement program, especially regarding Pfizer's responsibility to fund surgical procedures and related medical care of those recipients who have their valves replaced, may have been substantially different had complete information about the detection device been disclosed earlier since the necessity of performing explant surgery is likely to be greater now.

Also disturbing is the amount apparently being paid to certain implantees who were not part of the class action

settlement. Shiley and Pfizer have evidently entered into separate confidential agreement-in-principal with a Minnesota-based law firm representing several hundred Shiley heart valve recipients who have filed stress and anxiety claims against Shiley and Pfizer. These recipients had opted out of the Cincinnati settlement.

The settlement of the class action suit in Cincinnati, a process in which Shiley and Pfizer played a leading role, was intended to establish an equitable standard for treatment of all surviving Shiley convexo-concave heart valve patients. However, under the reported confidential arrangement, Shiley and Pfizer have agreed to pay the recipients represented by the Minnesota law firm substantially more money than what will be paid to kindred valve recipients under the Cincinnati settlement agreement.

If Shiley and Pfizer have agreed to pay in the six-figure range to each U.S. recipient of the Minnesota settlement, and concurrently, pay approximately $4,000 to each of the implantees who were part of the Cincinnati class action suit, it is reasonable to question the adequacy of the class action settlement. The existence of the separate, confidential Minnesota settlement raises questions about the fairness, adequacy and reasonableness of the class action settlement since the claims on behalf of the class action participants obviously have a much greater significance in terms of risk and cost factors for Shiley and Pfizer than what was presented to Judge Spiegel.

In our opinion, the settlement information relative to the confidential agreement should be furnished to the reviewing federal court to assist it in making its determination of the fairness of the class settlement.

On behalf of all surviving Shiley heart valve recipients and their families, we implore Shiley and Pfizer to fully and accurately disclose all relevant information they have concerning studies, tests and devices, and all other matters

relative to the discovery of incipient fractures of the Bjork-Shiley convexo-concave heart valve. It is appropriate to question why the news of the breakthrough of successfully developing a viable fracture detection device, and the disclosure of a multimillion dollar, confidential settlement, is brought to light right after the U.S. District Court in Cincinnati approved the class action settlement.

It has been suggested to me at special counsel that the final settlement of the class action suit should be reviewed by the court on behalf of the heart valve implantees to see if it still meets the court's requirement of bing, "fair, adequate and reasonable," before the Cincinnati class action settlement is upheld. The court should be furnished complete and updated information on both the status of the research and work on the detection devise, and on the recently disclosed Minnesota settlement.

Caprets & Kasdan is an independent law firm located in Irvine. The firm specializes in civil law, including disputes involving business torts, real property, construction law, corporate law, and estate and tax law. Additionally, Caprets & Kasdan has been involved in the Bjork-Shiley heart valve matter since the mid-1980s. The firm has worked closely with citizens groups, including Washington, D.C.-based Public Citizens Health Research Group, in protecting the legal rights of heart valve recipients.

CONTACT: Daniel J. Carlsson Public Relations, Laguna Hills, Calif. Daniel J. Carlsson, 714/583-3545.

EXHIBIT "E"

ORANGE COUNTY
Los Angeles Times
Saturday, October 17, 1992

$31-Million Settlement May Be in Works on Shiley Heart Valve

By TED JOHNSON
Special To The Times

IRVINE-Lawyers representing more than 300 recipients of potentially defective Shiley heart valves are negotiating a $31 million settlement with the manufacturer of the device, according to documents obtained by The Times this week.

Most of the clients, represented by attorney Bruce Finzen of the Minneapolis law firm of Robins, Kaplan, Miller & Ciresi had sued Pfizer Inc. in New York and its subsidiary, Shiley Inc. In Irvine, saying they live in fear that their valves will fracture. Most of the suits are pending in Orange County Superior Court.

The Shiley valves were sold between 1979 and 1986 and have been implanted in about _1,000 people worldwide. Of those, about 900 have died when struts in the valves came apart.

Earlier this year, Finzen's clients opted not to take part in a $215-million class-action settlement approved by a federal court in August. Opponents of the class-action settlement had argued that the compensation was unfair, given their anxiety about the safety of the valve.

According to an unsigned escrow agreement, Pfizer is to place $31 million plus interest in a Norwest Bank account of Finzen's law firm by Tuesday. The money is to be

released pending approval of the settlement by Pfizer's board of directors and notice that claims against the company have been dropped, the agreement states.

Pfizer officially denied Friday that any consensus has been reached.

"The company has not entered into any agreement," Pfizer said in a statement. "However, we have been negotiating with the Robins, Kaplan, Miller & Ceresi firm on all of their cases and claims, which include lawsuits filed in California state courts."

The goal of such settlement negotiation would be to put all of the Robbins, Kaplan claims behind the company," Pfizer said. "As a matter of policy, we do not discuss ongoing negotiation or litigation."

The company said that it is also negotiating with the law firm over an unspecified number of cases involving patients whose valves fracture.

Finzen, who represents 341 valve recipients, would not elaborate on his comment. But a source following the case said that an agreement is "very close" to being completed and could be announced in Orange County Superior Court, where a hearing to discuss a pending trial has been scheduled for Oct. 26.

The settlement, the source said, classifies recipients according to whether they live in California, elsewhere in the United States or in other countries. Patients in each area are thought to have varying degrees of difficulty in pursuing their claims, according to the source, with California residents having the greatest likelihood of success. Recent state court rulings have made it tougher for out-of-state recipients to pursue their cases in the state.

The escrow agreement, which is confidential, also states that the settlement of claims "is not and shall not be construed as an admission of liability or fault by Pfizer."

It was unclear what effect such an agreement would

have on the earlier class action settlement, which a federal judge in Cincinnati approved on Aug. 19.

Two weeks after that settlement was approved, Philadelphia lawyer Gary Green filed an appeal, arguing that the terms were unfair and that not enough consideration was given to those who objected to the offer. The appeal is pending.

That settlement provides heart-valve recipients with a total of $90 million to $140 million for medical or psychological consultations in which their spouses may be included. That works out to about $2,500 to $4,000 each.

The settlement also designates $75 million for research on procedures to detect flawed valves. In addition, an independent panel will set up guidelines for determining whether surviving patients need operations to replace their heart valves. Shiley will pay for any needed operations.

Finally, it sets aside $300 million for patients whose hear valves may fracture in the future. The amount ranges from $500,00 to $2 million for each recipient or family depending on such factors as the age and the overall health of the patient. That money is not considered part of the total now available.

For six years, Green had been seeking a separate class-action settlement that would have covered about 2,500 Pennsylvania recipients.

We thought it was a miscarriage of justice," Green said of the Aug. 19 agreement. "There was no way of knowing what the settlement meant."

EXHIBIT "F"

Public Citizen
Buyers Up * Congress Watch * Critical Mass * Health Research Group * Litigation Group

November 19, 1992

Stuart M. Gerson
Assistant Attorney General
Civil Division, Department of Justice
Room 3143
10th and Constitution Ave., N.W.
Washington, D.C. 20530

Dear Mr. Gerson:

It has recently come to our attention that the Department of Justice has decided not to criminally prosecute Shiley Incorporated, the maker of the defective Bjork-Shiley Convexo-Concave prosthetic heart valve. As you know, Shiley, a subsidiary of Pfizer, Inc., marketed this valve between 1979 and 1986; the valve has a tendency to fracture, resulting in death approximately two-thirds of the time a fracture occurs. We estimate that approximately 900 deaths have occurred as a direct result of Shiley valve fractures, and tragically, they continue to occur at an alarming rate.

In early 1990, a Congressional investigation, led by Representative John Dingell, made public information that only some, including the Food and Drug Administration ("FDA"), had known for years -- that Shiley and Pfizer had deceived the Agency in obtaining approval and continuing to

2000 P Street NW * Washington, D.C. 20036 *
(202) 833-3000

market the deadly valve. Indeed, as early as 1984, Public Citizen petitioned FDA to remove the valve from the market and, shortly thereafter, obtained company documents making clear the serious design and manufacturing problems with the valve.

In a letter dated June 3, 1992 from yourself to Senator John McCain, you told Senator McCain that criminal prosecution was declined by your Department "largely because it appeared that the statute of limitations had expired for most, if not all, prosecutable violations." A copy of that letter is attached.

The fact that no criminal prosecution will be brought is a travesty of justice. As the December 1990 Report of the Shiley Task Group, written by FDA medical devices experts, found:

> Shiley, Inc. has engaged in a continuing scheme to interrupt, deflect, and misdirect FDA's regulation of the Shiley Convexo-Concave heart valve.

From the beginning, Shiley withheld critical information from the FDA during the device approval process. Indeed, the company failed to inform the Agency that fractures had occurred during preclinical testing. Further, Shiley expressly directed the valve's chief designer, Dr. Viking Bjork, to withhold evidence of valve fractures and not to publish his data. Although the company's possible violations of law are too numerous to mention in this letter, a few examples taken from the Task Group Report are illustrative:

* Shiley withheld evidence of strut fractures in pre-clinical testing from its pre-market approval application.
* Shiley finally submitted evidence of the pre-clinical strut fractures six and one-half years after FDA approval of the device, in a

300-document data dump, apparently as "part of a continuing scheme to withhold crucial information" from the FDA in order to assure the continuing marketing of the[] heart valve."

* There were serious delays in reporting the first strut fractures in patients after the device was approved in 1979, "reflect[ing] an effort on Shiley's part to keep information from FDA to allow time for [Shiley] to develop a strategy on how to deal with it to assure continued marketing of the valves."

* Shiley repeatedly told the Agency that the valve had a better blood clotting record compared to other valves, when it knew it could not prove that assertion. By telling FDA that the valve was just as safe as other valves overall (i.e., just as safe despite the fracture problem), when that was not true, Shiley and Pfizer were able to keep the valve on the market and needless deaths occurred.

* In a series of letters, Shiley consistently mislead doctors, patients, and FDA, minimizing the true risks from the valve.

***

It is clear that an injustice has occurred. In your letter to Senator McCain, you do not indicate when the potentially prosecutable offenses occurred and at what point FDA referred the matter to the Justice Department for investigation. If FDA failed to make a timely referral, the responsibility clearly lies with the Agency. FDA has known about Shiley's misdeeds for years -- a failure to refer the matter to your office in a timely manner would be inexcusable, given the gravity of Shiley's conduct. If there was a timely referral to Justice, the Justice must shoulder the

blame. In any event, the government's conduct here sends a strong, but inexcusable signal that future corporate criminals have little to fear.

Your letter to Senator McCain strongly implies that, in the absence of statute of limitations problems, criminal prosecutions would have been brought. It also implies that some of the prosecutable offenses are not beyond the applicable statute of limitations. Indeed, FDA's 1990 Report refers to a "continuous scheme" to mislead FDA. In that regard, we note that it likely that the statute of limitations has not run on possible criminal conspiracy or racketeering charges. We therefore urge the Justice Department to immediately reassess the statute of limitations issue and file criminal charges without delay for all potential offenses that are not time barred.

Finally, we note that your letter assured Senator McCain that the Department was actively investigating the possibility of bringing civil charges against Shiley under the False Claims Act and the common law, because of alleged "marketing [of] faulty valves that were ultimately paid for by the Government through Medicare or VA hospitals." The possibility that Pfizer misused public funds means to assist elderly and disabled citizens and veterans through the implantation of a potentially deadly heart valve is a matter of extreme seriousness. We implore you to promptly finish this investigation and make public your decision about whether charges will be pursued.

***

The Shiley tragedy began over a decade ago, but the government has still taken no significant enforcement action. Either FDA or the Justice Department, or perhaps both, plainly dropped the ball. If Shiley broke the law, it should have been held accountable. The Department must act now to prevent further injustice.

Sincerely,
/s/
Sidney M. Wolfe, M.D.
Director, Public Citizen
Health Research Group

cc: Dr. David Kessler
Commissioner, U.S. Food and
Drug Administration (w/encl.)
Senator John McCain (w/encl.)
Representative John Dingell (w/encl.)

U.S. Department of Justice
Civil Division

Office of the Assistant Attorney General
Washington, D.C. 20530

June 3, 1992

The Honorable John McCain
United States Senate
Washington, D.C. 20510

Dear Senator McCain:

This is in response to your recent letter regarding an inquiry from Eric R. Adam, one of your constituents. Mr. Adam wrote to your office expressing concern about the Government's investigation into the sale of defective heart valves by Shiley, Inc., a subsidiary of Pfizer, Inc.

At the request of the Food and Drug Administration, this matter was considered for possible criminal prosecution. Largely because it appeared that the statute of limitations had expired for most, if not all, prosecutable violations, it was determined that criminal prosecution was not feasible.

The Civil Division is now considering whether Shiley violated the False Claims Act, 31 U.S.C. §§ 3729 et seq., and the common law by marketing faulty heart valves that were ultimately paid for by the Government through Medicare or VA hospitals. We will apprise you of the final resolution of this matter.

Please do not hesitate to contact me if I may be of further assistance.

Sincerely,
/S/_____
Stuart M. Gerson
Assistant Attorney General

CERTIFICATION OF SERVICE

I, Gary Green, Esquire, hereby certify that I served a true and correct copy of the foregoing document on the following **via overnight delivery**:

Stanley M. Chesley, Esquire
WAITE, SCHNEIDER, BAYLESS & CHESLEY
Suite 1513 Central Trust Tower
Fourth and Vine Streets
Cincinnati, OH 45202

David Klingsberg, Esquire
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, NY 10022

via regular U.S. mail

Marc D. Mezibov, Esquire
SIRKIN, PINALES, MEZIBOV & SCHWARTZ
940 4th & Race Tower
Cincinnati, OH 45202

Paul Tobias, Esquire
TOBIAS, KRAUS & TORCHIA
911 Mercantile Library Building
414 Walnut Street
Cincinnati, OH 45202

Gates T. Richards, Esquire
3807 Carew Tower
441 Vine Street
Cincinnati, OH 45202

Vance C. Simonds, Jr., Esquire

CAPRETZ & KASDAN
2091 Business Center Drive, Suite 200
Irvine, CA 92715-1156

Lewis J. Saul, Esquire
7315 Wisconsin Avenue
Suite 601 North
Bethesda, MD 20814

John T. Johnson, Esquire
CALVIN, DYLEWSKI, GIBBS, MADDOX
& VERNER, P.C.
1000 Louisiana, Suite 4500
Houston, TX 77002-5012

Brian Wolfman, Esquire
Public Citizen Litigation Group
2000 P Street, N.W. Suite 700
Washington, D.C. 20036

Charles Wolfson, Esquire
CASHMAN & PARTNERS
3rd Floor, 184-190 Day Street
Sydney, Australia NSW 2000

Harry Plotnick, Esquire
Suite 115
9624 Cincinnati-Columbus Road
Cincinnati, OH 45241

Bruce A. Finzen, Esquire
ROBINS, KAPLAN, MILLER & CERESI
1800 International Centre
900 Second Avenue South
Minneapolis, MN 55402-3394

Brian R. Magana, Esquire
MAGANA, CATHCART & McCARTHY
Suite 810 Gateway West Building
1801 Avenue of the Stars
Los Angeles, CA 90067

Hearle D. Scales
1041 Beach Grove Road
Science Hill, KY 42553

/S/_____
GARY GREEN

DATE: March 1, 1993

APPENDIX P

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. C-1-91-256
	)	
	)	S. ARTHUR SPIEGEL,
Plaintiffs,	)	JUDGE
	)	
v.	)	
	)	
PFIZER, INC., ET AL.,	)	

/

PENNSYLVANIA CLASS OBJECTOR'S MOTION FOR THE COURT TO RULE ON PENDING MOTION UNDER FED.R.CIV.PRO. 59(e) AND RULE 24(A) AND (B), AND REQUESTING OTHER RELIEF

This Motion is brought by Elizabeth W. Ridgeway, Rosemary Grunsby and Fred Grunsby (occasionally known previously in this proceeding as the Pennsylvania Class Objectors, and referred to in this Motion collectively as "PCO"), objecting class members in this product liability class action, by their counsel. The Motion asks the Court to rule on their pending Motion that was filed under Rules 59(e) and 24. A copy of that Motion is attached hereto as Exhibit "A". In support of this Motion, the PCO rely on the attached

Memorandum of Law and the following:

1. This Court entered an Order on August 19, 1992 and a judgment on September 9, 1992, which certified a class and approved the settlement of a class action.

2. The PCO's Petition for *Certiorari* was denied by the Supreme Court (along with virtually every other petition pending since the close of the Court's 1993 term).

3. The PCO have yet to have any appellate court consider the merits of their appeal of the approval of the class settlement and the certification of the class in this case.

4. The PCO did not cause any delay in the appeal proceeding, and in fact, to expedite a resolution of their original appeal, they filed their Notice of Appeal well before the deadline. By contrast, Pfizer and Class Counsel filed motions to dismiss which served to elongate the appeal proceedings. In addition, all parties to the original appeal participated in the Sixth Circuit's Mandatory Mediation Program under its Rule 18 in an unsuccessful effort to resolve the appeal.

5. The history and status of the portion of the case still pending before this Court, as pertains to an unresolved motion filed under Fed.R.Civ.Pro. 59(e) and Rule 24 by the PCO is as follows:

a. On September 24, 1992, (which was before the time for filing an appeal from this Court's September 9, 1992 judgment had expired, but after PCO had filed their Notice of Appeal), PCO filed a formal *Motion to Intervene* in this Court, and sought "expedited consideration". In the motion, PCO stated at ¶ 5, *inter alia*,

> "This motion is filed under Fed.R.Civ.P. 8(e)(2) to establish an alternative status for Movants as intervenors for purposes of challenging the judgment in this Court and/or on appeal."

b. On September 28, 1992, PCO filed a

Supplemental Motion to Intervene to clarify that the intervention motion they had filed on September 25, 1992 sought intervention for them as individuals as well as in a representative capacity on behalf of the "Pennsylvania Class Objectors".

c. On October 20, 1992, PCO filed a *Second Amended Motion to Intervene* in which they stated at page 3, *inter alia*,

> "In this Second Amended Motion, Movants request, pursuant to Fed.R.Civ.Pro. 60(b) that the mistake of not asking to be called "intervenors" earlier be allowed to be corrected, and that the Motion to Intervene be granted pursuant to Fed.R.Civ.Pro. 15, relating back to May 5, 1992, the date when counsel for Movants entered their appearance in this case and filed their written objections."

d. This Court declined to rule on either of PCO's motions to intervene. Instead, in an Order dated November 9, 1992, this Court ruled,

> "Given that notices of appeal have been filed in this class action (see docs. 258, 278), the Court has concluded because of the uncertainty of its continuing jurisdiction in this case for any purpose, that no application or motion currently pending addressed to this Court will be decided by this Court until this case has been remanded to it by the Court of Appeals for further proceedings, or this Court has been directed by the Court of Appeals to decide any of such pending applications or motions."

e. Due to the Sixth Circuit's Mandatory Mediation Program, litigation hostilities were suspended during a negotiation period that began in October, 1992 and continued until the efforts to "mediate" the appeal reached an

unproductive conclusion in mid-February, 1993.[1]

F. On December 21, 1993, the Sixth Circuit, in an *unpublished* Memorandum dismissed the appeal filed by the PCO. The Sixth Circuit based the dismissal on the grounds that although the PCO were members of the settlement class, because the PCO had not been formally granted the status as "intervenors" in this Court, they lacked standing to appeal.[2]

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[1] Within two months after this Court had approved the class settlement, evidence surfaced in various newspaper articles that tended to prove that this Court had been misled by the proponents of the settlement. However, due to the suspension of hostile litigation activities while the Mediation Program was running its course, the PCO could not ask this Court to conduct proceedings to investigate the matter until the Mediation Program failed in its objectives in February of 1993. Accordingly, on March 1, 1993, PCO filed in this Court a *Motion of the PA Class Objectors for Expedited Consideration and Raising Matters under Fed.R.Civ.Pro. 60(b)(2)(3) and (6)("60(b)Motion")(R.315).* The *60(b) Motion* asked this Court to follow the procedure announced by the Sixth Circuit in *First National Bank of Salem, Ohio v. Hirsh*, 535 F.2d 343 (6th Cir. 1976), as it pertains to Rule 60(b) motions while a case is on appeal.

The *60(b) Motion* was based in part of the proposition that Class Counsel and Defendants (and those acting in concert with them) had seemingly defrauded this Court at the Fairness Hearing. The PCO relied on exhibits and citations to the record to demonstrate that during the Fairness Hearing, false statements had been presented to this Court on key issues; and that the Court's rulings were influenced and shaped by the false statements.

[2] In its *unpublished* Memorandum, the Sixth Circuit did not comment on the fact that the PCO had been allowed to

g. On January 3, 1994, the PCO filed a *Petition for Rehearing En Banc* with the Sixth Circuit relating to the Order dismissing the appeal. The Petition for Rehearing was denied on March 3, 1994.

h. The PCO, in conjunction with a new found ally, Trial Lawyers For Public Justice, P.C. (A public interest group with headquarters in Washington, D.C.) filed a *Petition for a Writ of Certiorari* with the Supreme Court, challenging the Sixth Circuit's dismissal of their appeal. The Supreme Court denied the Petition on or about October 3, 1994.

I. On April 15, 1994, this Court denied the PCO's motions to intervene, the earliest of which had been pending with this Court since September 24, 1992.

j. On April 13, 1994, the PCO filed a motion in this Court requesting the following relief, *inter alia,*

1) pursuant to **Fed.R.Civ.Pro. 59(e)**, to amend this Court's judgment and/or order dated

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participate fully in this Court's proceedings; that the form of Notice to the class, (approved by this Court and offered by Class Counsel in his role as fiduciary to the absent class members did not mention intervention as a requirement of participation in the Fairness Hearing) or that no party ever objected in this Court to the full participation of the PCO on the grounds that they lacked standing or that they had failed to intervene. Since there were two *published* Sixth Circuit opinions which firmly established that intervention was not required for the participation in (and the appeal of rulings made at) a settlement hearing by absent class members in a class action brought under Fed.R.Civ.Pro. 23(b)(3), it is not surprising that neither this Court nor any of the numerous lawyers who attended and took part in the Fairness Hearing even mentioned the issues of intervention or standing.

April 5, 1994 denying the PCO's motions to intervene; and

2) pursuant to Fed.R.Civ.Pro. 24(a) and 24(b), to allow the PCO to intervene for the purposes of participating in post-settlement proceedings, which included, (at the time the Rule 59(e) Motion had been filed), *inter alia*, the PCO's still undecided *60(b) Motion*, and the intended filing by the PCO of an amended motion under Rule 60(b) *("59(e) Motion")*. A copy of this Motion (which is still undecided) is attached hereto as Exhibit "A".

k. On April 12, 1994, the same day that the PCO's *59(e) Motion* relating to intervention was filed, this Court entered an Order denying the PCO's *60(b) Motion* (which as mentioned above, had been filed March 1, 1993).[3]

l. On May 3, 1994, the PCO filed a Notice of Appeal of this Court's denial of the *60(b) Motion*.[4]

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[3] Due to the PCO's pending appeal relating to the merits of the class action settlement, this Court had deferred ruling on the merits of the *Rule 60(b) Motion*. After the Sixth Circuit denied the PCO's Petition for Rehearing on March 3, 1994, and the case was remanded, this Court entered its two Orders in April of 1994 that are discussed in this Motion.

[4] The PCO would have preferred to have had a ruling on their *Rule 59(e)* motion (that asked this Court to reconsider its denial of intervention) before they filed the appeal of this Court's denial of their *Rule 50(b) Motion*. However, because this Court denied the PCO's *Rule 60(b) Motion* on the very same day that the PCO filed their *Rule 59(e) Motion* (the *Rule 59(e) Motion* and this Court's April 5, 1994 Order denying the *Rule 60(b)* Motion crossed in the mail, the PCO had no choice about the timing of the filing of the appeal of the denial of their *Rule 60(b) Motion*.

The deadline for appealing the denial of the PCO's *60(b)*

m. On May 17, 1994, the Sixth Circuit entered an Order requiring the PCO to show cause why the appeal should not be dismissed for lack of jurisdiction based upon the dismissal of the original appeal on grounds of lack of standing. Based upon the procedural posture of this case in the district court, the PCO requested that the appeal be stayed and/or held in abeyance, and that this case be remanded to the district court for further proceedings on the PCO's *Rule 59(e) Motion* and *Motion to Intervene,* which, as noted above were still pending in this Court.

n. In another *unpublished* Order, on August 8, 1994, the Sixth Circuit dismissed the PCO's appeal of the denial of their *Rule 60(b) Motion.* Again, the Sixth Circuit held that the PCO lacked standing. Significantly, the Sixth Circuit stated,

> "As we stated in dismissal of a prior appeal by these appellants, nonparty members who object to a settlement have no standing to appeal the settlement in the absence of a grant of intervenor status [citations omitted]. Having been denied intervenor status in this case, it follows that the appellants also lack standing to appeal the denial of the Rule 60(b) motion. We are not persuaded to the contrary by the appellants' argument that a motion to reconsider the denial of their motion to

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Motion was due to expire before responses to their *59(e) Motion* were even due. There was simply no practicable way to withdraw the *59(e) Motion* or otherwise preserve their right to appeal this Court's April 5, 1993 Order denying intervention. Accordingly, the question of whether the PCO will be allowed by this Court to intervene was still open question at the time the PCO filed their appeal of the denial of their *60(b) Motion.*

intervene is pending. The lack of intervenor status at the time of the appeal suggests that the appellants were not "parties" when they brought the notice of appeal."

6. In summary, this Court is requested to rule on the outstanding motion filed by the PCO under Rules 59(e), 24(a) and 24(b); to grant that motion and allow the PCO to be deemed intervenors; and to relate the grant of intervention back to the PCO's participation in the Fairness Hearing, or in the alternative, to September 24, 1992, the date the PCO first filed their original motion to intervene.

Wherefore the PCO respectfully requests that the Court grant the relief requested herein.

/s/
GARY GREEN
LARRY M. KELLER

MORTON B. WAPNER
Attorneys for Movants

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street 12th Floor
Philadelphia, PA 19106
(215) 574-0600

WAPNER, NEWMAN & ASSOCIATES
115 South 21st Street
Philadelphia, PA 19103-4433
(215) 569-0900

DATED: October 7, 1994

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. C-1-91-256
	)	
	)	S. ARTHUR SPIEGEL,
Plaintiffs,	)	JUDGE
	)	
v.	)	
	)	
PFIZER, INC., ET AL.,	)	

MEMORANDUM OF LAW

A. THE PCO RECOGNIZE THAT THEY ARE ASKING THIS COURT TO SEPARATE THE MAN FROM THE JUDGE

For more than two years, at a cost of hundreds of thousands of dollars to counsel for the PCO, they have sought only one thing; to obtain appellate review of this Court's approval of the class settlement and its certification of the settlement class. It has been a frustrating ordeal, unlike any experience counsel for the PCO have had. The rules were blatantly changed in mid-stream, and other remarkable actions were taken that in the context of our system, would seem impossible. Frankly, it is fortunate that Alexis de Tocqueville did not have the opportunity to learn about how our system has treated the PCO when he wrote, *Democracy In America*. Otherwise, rather than his flattering description of our courts, the world may have read about a *labyrinth designed to exhaust* litigants where published and well-known precedents and interpretations of procedural rules are ignored,

and substantive rights have no meaning. Here, the *procedural* concept to intervention has been tortured and contorted to deprive the PCO of *substantive* rights on appeal in a way that rudely mocks sentiments such as found in Fed.R.Civ.Pro. 1, which commands that the procedural rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action".

The key to escaping the *labyrinth* is in the form of the simple label, "intervenors". In requesting that the Court give them this label, the PCO is not asking this Court to do anything more than to give a name to the status this Court already accorded the PCO during the Fairness Hearing.

Stated in abstract terms, what is before the Court now is a test of fealty. In this case, the Court can be faithful to its own prior actions and the *reality* of occurred in this case during the Fairness Hearings. This can be accomplished by granting the *Rule 59(e) Motion*. On the other hand, the Court can direct its fidelity to the concept of preserving and protecting this class action settlement, even if to do so would require the Court to avoid acknowledging the status of the PCO that was obvious at the Fairness Hearing.

With the enormous apparatus of the class action settlement about to be cranked into operation, the PCO are probably perceived by the Court as gadflies. Indeed, the Court may have always viewed the PCO in this light. But as it is written, our system of jurisprudence gives even gadflies rights. For better or worst, the PCO are in the unenviable and ironic position of asking this Court to help them to get the chance to argue to an appellate court that this Court committed error in certifying the class and in approving the settlement. Moreover, the PCO presume that if they were successful, and the settlement was disturbed on appeal, this Court would be gravely disappointed because it appears to the PCO that this Court fervently and sincerely believes that the settlement provides benefits to a large, deserving class of

people who might never be able to recapture the benefits. Nevertheless, despite the perceived consequences, for the reasons described below, integrity and *justice* require that the PCO's *Rule 59(e) Motion* must be granted. To not grant the motion would signify that our system has replaced traditional notions of due process with the "ends justify the means".

B. WHAT IS JUSTICE?

The Court, in its Order of April 5, 1994, grounded its refusal to grant the PCO's original motions for intervention by stating:

> "Accordingly, because of the substantial delay between approval of the settlement and return of this case to this Court and the fact that intervention at this point would be prejudicial to the class, in the interest of **justice**, we hereby DENY the Movant's motions to Intervene" (emphasis added).

As will be shown, the Court skipped an important step in looking for justice. Before it could determine what was justice on April 5, 1994, it was obliged to first cure an injustice that was infecting this case from the time the first appeal of the PCO was dismissed in December of 1993.

The trial court has a fiduciary duty to the absent class members whenever it orders the certification of a class. When the Notice to the Class that this Court approved was sent to the PCO, they were among the absent class members to whom the Court's duty flowed.[1]

The Notice to the Class stated specifically that to object and participate in the Fairness Hearing, all that absent class members needed to do was to individually (or through

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[1] The PCO are still absent class members.

their attorney), file an appearance and written objections timely. Nothing in the Notice approved by this Court mentioned that unless an absent class member intervened under Fed.R.Civ.Pro. 24, his participation in the settlement-approval and class certification hearings would be limited solely to announcing his views at an **unappealable** Fairness Hearing proceeding in the district court, and that he would have no standing to appeal **any** order entered by the district court, regardless of how egregious.[2]

This Court's comprehensive Memorandum Opinion (143 F.R.D. 141) is testament to the fact that the PCO were, *in reality*, permitted to participate in the Fairness Hearing proceedings as parties, with a valid, cognizable stake in the outcome. Based on the fact that the Court allowed them to enter evidence, take discovery, file motions, respond to motions, examine witnesses, make arguments, and otherwise enjoy the rights and privileges of an interested litigant, if at the outset the PCO had requested the label of "intervenors", there appears little doubt that such a request for intervention would have been granted.[3]

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[2] The PCO are convinced that if this Court had any suspicion that an absent class member who participated in the Fairness Hearing would be deemed to have no standing to appeal despite having followed the instructions in the Notice to the Class, this Court would have *insisted* that the Notice warn the class members that intervention was a necessary predicate to an appeal. Otherwise, the concept of *"participation"* by unnamed class members at the Fairness Hearing would be reduced to mere *observation*, like a kibitzer at a checkers game.

[3] Obviously, the PCO satisfied Fed.R.Civ.Pro. 24(a) in that: they had a legal interest in the subject of the action; their ability to protect their interests may have been impaired or impeded

Why did the PCO not request formal intervention? It is likely that the PCO did not believe intervention was needed to confer standing for the same reasons the Court never raised the issue of intervention; none of the other, numerous attorneys representing objectors at the start of the hearing filed motions for their clients to intervene; and why neither Class Counsel nor the defendants ever challenged the standing of the PCO on failure to intervene grounds. Simply stated, this Court set the ground rules for full participation when the Notice to the Class was approved. The ground rules were clear to all parties, and all parties saw that this Court obviously believed that intervention was not necessary to confer legal standing on objectors.[4]

The commonly held view at the Fairness Hearing that intervention was unnecessary was not based on blind faith, nor were the lawyers for all of the objectors relying on some procedural idiosyncrasies of this Court. On the contrary, the only two published opinions of the Sixth Circuit that

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by the Court's approval of the class and settlement; and they surely could not depend on Class Counsel to protect their interests since it was he that they claimed had put their interests at risk.

[4] The alternative is unthinkable; it would require one to believe that the Court knew intervention was necessary, but set out to trick, mislead or trap the trusting absent class members and their lawyers who looked to the Court for guidance as to what the Court required for full participation at the hearing; and justifiably relied on the Court's adherence to the standards announced in the Notice. All of the attorneys acted to confirm the apparently shared view that if an absent class member complied with the conditions in the Notice, he and his attorney could participate and object to the settlement.

addressed the issue of whether an absent class member in a Rule 23(b)(3) class action had to intervene in order to establish standing, both held that intervention was not a requirement. *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942); *Sertic v. Cuyahoga Lake, Etc., Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972). Moreover, the leading text books and treatises on federal civil procedure all reported that it is well established in the Sixth Circuit that an unnamed class member who objects in the court below has standing to appeal an order approving the class settlement. *See* Wright, 7B *Fed. Practice and Procedure*, § 1787 at 360-61 (citing *Cohen*); 3B *Moore's Federal Practice* ¶23.80[5] at 496 (citing *Cohen*); Note, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 938.

The fiduciary duty this Court owes to the absent class members is not the only fiduciary duty implicated in the terms for participation set forth in the Notice to the Class. It goes without saying that Class Counsel owed an even greater fiduciary duty to inform the absent class members of what they had to do to preserve their right to object to the class certification and proposed settlement. As the Court's deputized lawyer for the *entire absent* class, Class Counsel was legally barred from willfully withholding crucial information that class members needed to know (such as any requirement he was aware of that they would be obliged to intervene formally if they wanted to be able to challenge the settlement). When he was certified as counsel for the provisional class on January 23, 1992, this Court did not carve out an exception that allowed Mr. Chesley to orphan absent class members who might file objections. Rather, Mr. Chesley was appointed by this Court to be the lawyer for *all* of the absent class members. However, in October of 1992, Mr. Chesley sought dismissal of the PCO's appeal on the grounds that they did not formally intervene. Did Mr. Chesley know that formal intervention was needed to establish

standing in January of 1992, when he drafted the form of notice this Court approved for distribution to the unnamed class members? Did Mr. Chesley intentionally withhold putting information about the need to intervene in the form of Notice to the Class he asked this Court to approve? Or is it that Mr. Chesley, like every other attorney for a class member who sat in the courtroom during the Fairness Hearing, was convinced that formal motions for intervention would be superfluous, time-consuming distractions from the serious business at hand.

There is no legal distinction between having standing to file motions and objections in the district court at the Fairness Hearing, and having standing to appeal the district court's disposition of the motions and objections. The standing to appeal flows directly from the standing to file in the district court. This Court always conferred standing on the PCO. The Court addressed straightforwardly, *and on the merits*, each motion filed by the PCO, and each point of objection. Not once did the Court question the standing of the PCO. Not once did the Court suggest that intervention was appropriate; and not once did the Class Counsel or defendants challenge the standing of the PCO, notwithstanding the other strenuous attacks they advanced against the positions posited by the PCO.

Therefore, in *reality*, the PCO were consistently treated as parties to the Fairness Hearing proceedings: by this Court; by counsel for other objecting class members; by Class Counsel; and by defendants. The Court and all others honored the formal filing of appearances by counsel for the PCO as having satisfied this Court's only condition for full participation as a party to the Fairness Hearing proceeding, and counsel for the PCO were afforded the same rights as counsel for defendants and Class Counsel.

Again the question arises, under these circumstances, "What is justice?".

The PCO ask this Court first to rule on their outstanding *Rule 59(e) Motion*, which itself merely asks the Court to simply acknowledge the *fact* that this Court always recognized their standing to be as if they were intervenors and proper parties at the Fairness Hearing.[5]

The PCO needs this Court to set the record straight for the Court of Appeals because the Sixth Circuit has embraced the notion that a class member cannot appeal the approval of a settlement if he was not allowed to intervene. The Sixth Circuit has refused to look behind labels, and because this Court has not addressed in any order or opinion the issue of the status and standing it afforded to the PCO at the Fairness Hearing, the Sixth Circuit has kept its doors locked to the PCO. The remedy most in accord with Fed.R.Civ.Pro. 1 is for this Court to grant the PCO's motion under Rule 59(e), and to reconsider the denial of the PCO's original motions for intervention. This would conform the record with *reality*. To further insure that *reality* is acknowledged, the PCO requests that any grant of intervention relate back to when counsel for the PCO complied with the conditions set forth in the Notice to the Class, and entered their appearances. The alternative is to leave the PCO in the position of the little kid in the schoolyard whose cap is being tossed back and forth by a group of more powerful bullies; ultimately the little kid

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[5] This Court has already demonstrated impliedly that it does not dispute the standing of the PCO. This is seen by the C ourt's Orders of April 5, 1994 (denying intervention) and April 12, 1994 (denying the *Rule 60(b) motion)*. In both instances, the Court could have latched on to the lack of standing position taken by the Sixth Circuit, and denied the PCO's motions without addressing their merits. Instead, this Court did not use lack of standing as a basis, and instead, did address the merits head on. The PCO are grateful to this Court for its consistency.

usually does get his cap back -- but at what cost?

With so much effort already invested in righting these perceived wrongs, the PCO are committed to seeing this through. There was injustice practiced not only against them, but also against the entire class, which deserves to have the issues resolved on their merits. Therefore, regardless of the outcome of this motion, the PCO will still attempt to get at least one merits-review of this Court's approval of the settlement. But unless this Court gives them the official label of "intervenors" to match the status the Court accorded them, on appeal, they will be forced to worry more about their standing than the merits. In this regard, it would seem that even the other parties would benefit from a review on the merits since at least there will be finality.

From the vantage of the PCO, there can be no justice if the ground rules for standing were changed when the case moved from the district court to the court of appeals. There can likewise be no justice if Class Counsel, by trickery or breach of fiduciary duty, gets to keep an appellate court from reviewing the merits of the settlement approval he sought, where the same Class Counsel composed the Notice to the Class, failed to object to the PCO's standing to participate at the Fairness Hearing (when it would have been easier for the PCO to cure by filing a prompt motion for intervention), and seemingly laid-in-wait and raised the lack of standing issue for the first time on appeal. Finally, it would be hypocrisy, not justice, for anyone to claim that the PCO did not have every vestige of an intervenor in the district court proceedings.

C. AN ORDER ALLOWING INTERVENTION SHOULD RELATE BACK.

If the Court grants the motion and allows the PCO to be called intervenors, it is imperative that this be allowed to

relate back for another reason. The PCO mailed their *Rule 59(e) Motion* to this Court on April 12, 1993, the *same* day this Court entered its Order denying the PCO's original *60(b) Motion*. Therefore, the PCO had obviously not received this Court's order entered on April 12, 1994 denying their *60(b) Motion*.[6]

After the PCO received the Court's Order of April 12, 1994, they were caught in a procedural quandary. They could not withdraw their *59(e) Motion*, since they were advised by the Clerk of Court for the Southern District of Ohio that there was *no* quick or simple procedure for withdrawing a motion. Rather, they were advised that they would have to file a *new* motion withdrawing the *59(e) Motion*, and such a new motion would be processed as any other motion. This meant that Defendants and Class Counsel would have had to have been afforded an opportunity to respond to the motion to withdraw the *Rule 59(e) Motion*, and that the district court would have to rule on it before. This process would take many weeks and would have extended beyond the thirty (30) day time period to appeal the denial of the *60(b) Motion*.[7]

On May 3, 1994, the PCO, having no alternative, filed a Notice of Appeal of this Court's Order of April 12, 1994 denying their *60(b) Motion*. The PCO could not at that time appeal this Court's Order denying their motions to intervene entered on April 5, 1994, since it was not a *final*

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[6] In fact, it was not until April 18th that the Order was delivered by mail to Appellants' counsel

[7] Under Local Rule 7.2 of the Southern District of Ohio, the Defendants would have had twenty-one (21) days to respond to Appellants' motion to withdraw.

appealable order due to the pending *59(e) Motion*.[8]

In short, it was procedurally not possible for the PCO to either delay their appeal or the denial of their *60(b) Motion* or join that appeal with an appeal of the April 5th Order denying intervention. This was because of the pending *59(e) Motion*. However, the Sixth Circuit refused the motion filed by the PCO to hold the appeal of this Court's ruling on the 60(b) motion until this Court could rule on the 59(e) motion, and instead, without waiting to see if this Court would grant the Rule 59(e) motion (and thus confer the coveted "intervenors" label upon the PCO), the Sixth Circuit dismissed the appeal on the basis of its prior ruling that the PCO, absent intervenor status, did not even have standing to file a 60(b) motion alleging fraud. If this Court grants a relation-back form of intervention, the merits of the 60(b) motion may be refiled with the Sixth Circuit. The alternative is for the PCO to file another Petition for Certiorari with the Supreme Court, seeking review of the Sixth Circuit's August 8, 1994 dismissal of the PCO's *Rule 60(b) Motion*.

D. CONCLUSION

The PCO respectfully requests that the Court grant the relief requested here and in the pending motion brought under Rule 59(e).

Respectfully submitted,

/S/_____

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[8] Fed.R.App.Pro. 4(a)(4)(c) states that an appeal from an order commences to run *after* a Rule 59(e) motion relating to the original order is ruled upon.

GARY GREEN
LARRY M. KELLER

MORTON B. WAPNER
Attorneys for Movants

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street 12th Floor
Philadelphia, PA 19106
(215) 574-0600

WAPNER, NEWMAN & ASSOCIATES
115 South 21st Street
Philadelphia, PA 19103-4433
(215) 569-0900

DATED: October 7, 1994

EXHIBIT "A"

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. C-1-91-256
	)	
	)	S. ARTHUR SPIEGEL,
Plaintiffs,	)	JUDGE
	)	
v.	)	
	)	
PFIZER, INC., ET AL.,	)	
_____/		

MOTION OF RIDGEWAY AND GRUNSBY, ET AL. UNDER FED.R.CIV.PRO. 59(E), AND RULE 24(A) AND (B), AND SEEKING ADDITIONAL RELIEF

The class-objectors named above (known herein collectively as "Movant") respectfully request that the court enter an Order: (a) under Fed.R.Civ.Pro. 59(e), to alter or amend this Court's judgment and/or Order dated April 5, 1994; (b) under Fed.R.Civ.P. 24(a) and 24(b) allowing Movant to intervene for the purposes of participating in post-settlement-approval proceedings, including, *inter alia*, the proceedings involving the award of attorney's fees, the adjudication of Movant's pending motion which was filed under Rule 60(b) ("original 60(b) Motion"), the filing by Movant an amended motion under Rule 60(b); and © granting Movant's original 60(b) Motion.

In support of same, Movant relies on the following,

and the attached Memorandum of Law.

BACKGROUND

1. The Court is familiar with the proceedings in this case, and therefore, they will not be restated here at length.

2. Presently pending before the Court, and still in need of an order adjudicating the merits, is the original 60(b) Motion.[1]

3. Movant is in the process of preparing a Petition for a Writ of Certiorari to the United States Supreme Court relating to the Court of Appeals' dismissal of Movant's Main Appeal. Nonetheless, the original 60(b) Motion has never been considered on its merits by this Court or by the Court of Appeals and, as noted, is still pending. Based on the ruling of the Sixth Circuit in dismissing the Main Appeal, however, Movant seeks to intervene for the purpose of avoiding the

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[1] In an Order of the United States Court of Appeals for the Sixth Circuit filed June 9, 1993, dismissing Movant's appeal from this Honorable Court's Order refusal to request the Court of Appeals to remand the case back to the district court for purposes of adjudicating the original 60(b) Motion, the Sixth Circuit noted, "the district court's order explicitly does not make a ruling on the merits of the Rule 60(b) motion, but addresses 'whether [the district court] wish[es] the Court of Appeals to remand the case back to [the district court]'".

The original 60(b) Motion has not yet been ruled upon by this Honorable Court, and for the reasons discussed later, under the *new* rule of procedure implicit in the Sixth Circuit's dismissal of Movant's appeal of the class settlement approval ("Main Appeal"), it may be necessary for Movant to be deemed an intervenor to insure Movant's standing on any subsequent appeal.

dismissal of any appeal Movant might need to file in the future, including, *inter alia*, appeals that might raise issues concerning the award of fees; the Court's ruling on the original and/or an amended Rule 60(b) motion; and other matters that might arise in the proceedings that are to follow.

RULE 59(e)

4. This Court's Order of April 5, 1994 appears to have erroneously viewed Movant as a mere "permissive" intervenor under Rule 24(b), but Movant sought also to intervene as "of right" under Rule 24(a). Moreover, the Court's April 5 Order concentrated its focus on events that have already transpired while ignoring that the Motion to Intervene would impact as well to the original Rule 60(b) Motion that is still pending, and also to the other post-settlement-approval-proceedings which shall unfold in the future (assuming that Movant is unsuccessful at the Supreme Court level).

5. Accordingly, Movant requests that the Court reconsider its Order dated April 5, 1994, and grant the Motion to Intervene.

RULE 24

6. In the alternative, Movant moves herein to intervene for the purposes of participating in the said post-settlement-approval proceedings.

7. Accordingly, if the Court denies Movant's Motion under Rule 59(e) as set forth above, Movant separately requests that the Court grant Movant's new motion to intervene under Fed.R.Civ.Pro. 24(a) and (b).

RULE 24(a)

8. Movant satisfies the requirement for intervention as of right under Rule 24(a) in that:

a. Under Rule 24(a), this Motion to Intervene is timely since the Court has not yet ruled on the outstanding motions seeking attorney's fees, or the pending original Rule 60(b) Motion filed by Movant. In addition, Movant intends to file an amended motion under Rule 60(b) to augment and update the original Rule 60(b) Motion. None of these matters have been adjudicated by the Court, nor have all other potentially contestable issues been resolved.

b. Under Rule 24(a)(2), Movant has a legally recognizable interest in the "property or transaction which is the subject of the action." For example, the award of attorney's fees will diminish the funds available to benefit class members, and Movant therefore has a protectable property interest in the amount and basis of the Court's fee award. Similarly, the Court's ruling on the original Rule 60(b) Motion will resolve Movant's rights as class members objecting to and challenging the result of the fairness hearing with evidence and matter which was concealed from or otherwise not knowable by Movant (or the Court) during the fairness hearing.

c. Under Rule 24(a)(2), it is apparent that Movant is "so situated that the disposition of the action as a practical matter would impair or impede Movant's ability to protect Movant's interest because Movant's interest is not and cannot be adequately represented by the existing parties." In this regard, the existing parties opposed the original 60(b) Motion, and have asserted a position concerning attorney's fees for class counsel and others with which Movant disagrees.

d. Accordingly, Movant satisfies the requirements of intervention as "of right" under Rule 24(a).

Rule 24(b)

9. Movant satisfies as well the requirements for permissive intervention under Rule 24(b), in that:

a. As mentioned above, this application for intervention is timely.

b. Under Rule 24(b)(2), there are, as a matter of definition, "common questions of law or fact" since Movant is a member of the class certified by this Court; and the granting of intervention at this point for purposes of post-settlement-approval matters, will not unduly delay or prejudice adjudication of the rights of the parties. Indeed, the Court has not yet begun to consider the merits of these matters.

10. For purposes of Rule 24(c), Movant incorporates herein by reference the said original 60(b) Motion, and requests further that if this motion for intervention is granted, that Movant be permitted twenty (20) days to file an amended motion under Rule 60(b) (which would augment and provide current information relating to the original 60(b) Motion).

WHEREFORE, Movant respectfully requests that the Court alter, amend or modify the Court's Order and/or judgment dated April 5, 1994 to allow Movant to intervene. In the alternative, Movant requests that the Court grant this within motion for intervention, and that it enter an Order allowing Movant to participate as an intervenor or a party in the post-settlement-approval proceedings; and that the Court provide whatever other relief is just and appropriate under the circumstances.

Respectfully submitted,

/S/_____
Gary Green
Attorney for Objectors/Movant

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street, 12th Floor
Philadelphia, PA 19106
(215) 574-0600

DATED: April 12, 1994

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. C-1-91-256
Plaintiffs,	)	S. ARTHUR SPIEGEL, JUDGE
v.	)	
PFIZER, INC., ET AL.,	)	

MEMORANDUM OF LAW

The Court is quite familiar with the proceedings and Movant will not belabor historical points that have been described at length before.

Fed.R.Civ.P. 59(e) provides the mechanism for asking a court to change its ruling when a litigant believes that an oversight or an injustice has occurred. In this matter, based on the ruling of the Sixth Circuit, Movant has a need to intervene to insure that any appeal that Movant might need to file will not be dismissed for lack of standing. Movant intends to participate in the attorney fee-related proceedings, and Movant has pending a motion under Rule 60(b). Movant as class members, have legal interests that they contend are adverse to (or at least not in accord with) those of the other litigants.

For reasons which are not material to this motion, the Sixth Circuit's ruling appears to Movant to be illogical, unworkable, and contrary to settled law. Therefore, Movant is in the process of preparing a Petition for a Writ of Certiorari to the United States Supreme Court. Nonetheless,

the Sixth Circuit's ruling is binding until the Supreme Court determines otherwise. Intervention therefore is more than a luxury to Movant.

The Court has not focused on Movant's need to intervene in the post-settlement-approval state of this case. Under Fed.R.Civ.P. 24(a) and (b), Movant plainly satisfies the criteria for intervention. Indeed, one basis of this Motion under Rule 59(e) is that the Court erred in apparently viewing Movant's original motion to intervene as having been filed under Rule 24(b) when in fact it was filed also under Rule 24(a). Movant had and still has the right to intervene in this case as of right under Rule 24(a).

In summary, because the Court still must consider outstanding motions for attorney's fees and the original Rule 60(b) Motion, and because Movant has new information to add to in an amendment to the Rule 60(b) Motion, the Court is requested respectfully to reconsider its Order dated April 5, 1994, or in the alternative, to grant this Motion to intervene. Movant asks also that the Court resolve the original 60(b) Motion.

Respectfully submitted,

/S/_____
Gary Green
Attorney for Objectors/Movant

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street, 12th Floor
Philadelphia, PA 19106
(215) 574-0600
DATED: April 12, 1994

CERTIFICATION OF SERVICE

I, Gary Green, Esquire, hereby certify that I served a true and correct copy of the foregoing document on the following **via overnight delivery**:

Stanley M. Chesley, Esquire
WAITE, SCHNEIDER, BAYLESS & CHESLEY
Suite 1513 Central Trust Tower
Fourth and Vine Streets
Cincinnati, OH 45202

David Klingsberg, Esquire
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, NY 10022

via regular U.S. mail

Marc D. Mezibov, Esquire
SIRKIN, PINALES, MEZIBOV & SCHWARTZ
940 4th & Race Tower
Cincinnati, OH 45202

Paul Tobias, Esquire
TOBIAS, KRAUS & TORCHIA
911 Mercantile Library Building
414 Walnut Street
Cincinnati, OH 45202

Gates T. Richards, Esquire
3807 Carew Tower
441 Vine Street
Cincinnati, OH 45202

Vance C. Simonds, Jr., Esquire
CAPRETZ & KASDAN
2091 Business Center Drive, Suite 200
Irvine, CA 92715-1156

James Capretz, Esquire
Capretz & Kasdan
2091 Business Center Drive, Suite 200
Irvine, CA 92715-1156

Lewis J. Saul, Esquire
7315 Wisconsin Avenue
Suite 601 North
Bethesda, MD 20814

James T. Johnson, Esquire
Johnson & Dylewski
Two Houston Center
909 Fannin, Suite 3220
Houston, TX 77010

Brian Wolfman, Esquire
Public Citizen Litigation Group
2000 P Street, N.W. Suite 700
Washington, D.C. 20036

Charles Wolfson, Esquire
CASHMAN & PARTNERS
3rd Floor, 184-190 Day Street
Sydney, Australia NSW 2000

Harry Plotnick, Esquire
Suite 115
9624 Cincinnati-Columbus Road
Cincinnati, OH 45241

Bruce A. Finzen, Esquire
ROBINS, KAPLAN, MILLER & CERESI
1800 International Centre
900 Second Avenue South
Minneapolis, MN 55402-3394

Brian R. Magana, Esquire
MAGANA, CATHCART & McCARTHY
Suite 810 Gateway West Building
1801 Avenue of the Stars
Los Angeles, CA 90067

Hearle D. Scales
1041 Beach Grove Road
Science Hill, KY 42553

/S/_____
GARY GREEN
Attorney for Objectors/Movant

DATE: April 12, 1994

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. C-1-91-256
	)	
	)	S. ARTHUR SPIEGEL,
Plaintiffs,	)	JUDGE
	)	
v.	)	
	)	
PFIZER, INC., ET AL.,	)	
_____/		

ORDER

AND NOW, this day of , 1994, upon consideration of the Motion of Ridgeway and Grunsby, et al. Under Fed.R.Civ.P. 24(a) and (b), and the views of the parties, it is hereby ORDERED and DECREED that the Motion to Intervene is GRANTED and Movant is allowed to participate as an intervenor and a party.

BY THE COURT:

/S/_____
S. ARTHUR SPIEGEL, J.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL. Plaintiffs, v. PFIZER, INC., ET AL.,	CASE NO. C-1-91-256 S. ARTHUR SPIEGEL, JUDGE

ORDER

AND NOW, this day of , 1994, upon consideration of the Motion of Ridgeway and Grunsby, et al. Under Fed.R.Civ.P. 59(e), and the views of the parties, it is hereby ORDERED and DECREED that the Court's Order dated April 5, 1994 is amended, and the Motion to Intervene filed by Movant is GRANTED.

BY THE COURT:

/S/_____
S. ARTHUR SPIEGEL, J.

CERTIFICATION OF SERVICE

I, Larry M. Keller, Esquire, hereby certify that I served a true and correct copy of the foregoing document on the following on today's date by U.S. First Class Mail:

Stanley M. Chesley, Esquire
WAITE, SCHNEIDER, BAYLESS & CHESLEY
Suite 1513 Central Trust Tower
Fourth and Vine Streets
Cincinnati, OH 45202

David Klingsberg, Esquire
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, NY 10022

James R. Adams, Esquire
Frost & Jacobs
Central Trust Tower, Suite 2500
201 East 5th Street
Cincinnati, OH 45202

Marc D. Mezibov, Esquire
SIRKIN, PINALES, MEZIBOV & SCHWARTZ
940 4th & Race Tower
Cincinnati, OH 45202

Paul Tobias, Esquire
TOBIAS, KRAUS & TORCHIA
911 Mercantile Library Building
414 Walnut Street
Cincinnati, OH 45202

Gates T. Richards, Esquire
3807 Carew Tower
441 Vine Street
Cincinnati, OH 45202

James Capretz, Esquire
Capretz & Kasdan
2091 Business Center Drive, Suite 200
Irvine, CA 92715-1156

Lewis J. Saul, Esquire
7315 Wisconsin Avenue
Suite 601 North
Bethesda, MD 20814

John T. Johnson, Esquire
Calvin, Dylewski, Gibbs, Maddox & Verner, P.C.
1000 Louisiana, Suite 4500
Houston, TX 77002-5012

Brian Wolfman, Esquire
Public Citizen Litigation Group
2000 P Street, N.W. Suite 700
Washington, D.C. 20036

Charles Wolfson, Esquire
CASHMAN & PARTNERS
3rd Floor, 184-190 Day Street
Sydney, Australia NSW 2000

Harry Plotnick, Esquire
Suite 115
9624 Cincinnati-Columbus Road
Cincinnati, OH 45241

Bruce A. Finzen, Esquire
ROBINS, KAPLAN, MILLER & CERESI
1800 International Centre
900 Second Avenue South
Minneapolis, MN 55402-3394

Brian R. Magana, Esquire
MAGANA, CATHCART & McCARTHY
Suite 810 Gateway West Building
1801 Avenue of the Stars
Los Angeles, CA 90067

Hearle D. Scales
1041 Beach Grove Road
Science Hill, KY 42553

Vance Simonds, Esquire
Kasdan, Simonds, Peterson, McIntyre, Epsein & Martin
2091 Business Center Drive, #200
Irvine, CA 92715-1156

/S/_____
LARRY M. KELLER

DATED: 10/7/94

APPENDIX Q

No. 92-3973

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
DEC. 21 1993
LEONARD GREEN, Clerk

ORDER

NOT RECOMMENDED FOR FULL TEST PUBLICATION
"Sixth Circuit Rule 34 To specific . Please Rule 24 before citing in a proceeding in a court in the Sixth Circuit, If cited, a copy must be served on other parties and the Court. This article is to be prominently displayed if this decision is produced.

ARTHUR RAY BOWLING, et al., Plaintiff-Appellees,
ELIZABETH W. RIDGEWAY, et al., Class Members-Appellants,
v.
PFIZER, INC., et al., Defendants-Appellees.

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; LIVELY, Senior Circuit Judge.

Elizabeth W. Ridgeway, Rosemary Grunsby, and Fred Grunsby appeal the district court's order approving the settlement of this product liability class action suit. Defendants Pfizer, Inc. And Shiley, Inc. move to dismiss, pursuant to Fed. R. App. P. 27, for lack of jurisdiction.

Because the appellants are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal. *See Guthrie v. Evans*, 815 F.2d 626, 627-38 (11th Cir. 1987); *see also Crovden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 91993); *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988). Therefore, the motion to dismiss this appeal is granted.

ENTERED BY ORDER OF THE COURT

/S/_____
Clerk

APPENDIX R

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. C-1-91-256
Plaintiffs,	)	S. ARTHUR SPIEGEL, JUDGE
v.	)	
PFIZER, INC., ET AL.,	)	

SUPPLEMENTAL MOTION TO INTERVENE
EXPEDITED CONSIDERATION REQUESTED

1. On September 25, 1992, Elizabeth W. Ridgeway, Rosemary Grunsby and Fred Grunsby, on their own behalf and as representatives of the Pennsylvania Class Objectors, filed a Motion to Intervene in the above captioned case.

2. Although this Motion to Intervene stated that the Motion was filed on their behalf and as representatives of the Pennsylvania Class Objectors, the proposed intervenors have in fact filed such Motion on their own behalf and as representatives of the Pennsylvania Class Objectors.

3. Attached hereto is a proposed Order to be

attached to the Motion to Intervene.[1]

WHEREFORE, Elizabeth W. Ridgeway, Rosemary Grunsby and Fred Grunsby, on their own behalf and as representatives of the Pennsylvania Class Objectors, respectfully request their Motion to Intervene be granted expedited consideration, and that the Court grant whatever other relief is just and appropriate under the circumstances.

/S/_____
Gary Green
Morton B. Wapner
Larry M. Keller
Attorneys for Elizabeth W. Ridgeway, Rosemary Grunsby And Fred Grunsby on their Own behalf and on behalf of The Pennsylvania Class Objectors

OF COUNSEL:

SIDKOFF PINCUS & GREEN, P.C.
530 Walnut Street - 12th Floor
Philadelphia, PA 19106
(215) 574-0600

---

[1] The Movants inadvertently omitted a sentence from the Memorandum of Law, p. 5, ¶2 referencing the Order of August 19, 1992. A sentence should be added stating "The Motion to Intervene is timely filed even when using the August 19, 1992 Order based upon the theory of laches."

WAPNER NEWMAN ASSOCIATES
115 South 21st Street
Philadelphia, PA 19103-4433
(215) 569-0900

DATED: September 25, 1992

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. C-1-91-256
	)	
	)	S. ARTHUR SPIEGEL,
Plaintiffs,	)	JUDGE
	)	
v.	)	**ORDER**
	)	
PFIZER, INC., ET AL.,	)	
_____/		

AND NOW, this day of , 1992, the Motion to Intervene of Elizabeth W. Ridgeway, Rosemary Grunsby and Fred Grunsby is GRANTED. It is further ORDERED that Elizabeth W. Ridgeway, Rosemary Grunsby and Fred Grunsby who are members of the class who have not opted out shall be deemed Intervenors under Fed.R.Civ.P. 24(a).

By the Court:

/S/_____
S. Arthur Spiegel, Judge

CERTIFICATION OF SERVICE

I, Larry M. Keller, Esquire, hereby certify that I served a true and correct copy of the foregoing document on the following:

via overnight delivery service

Stanley M. Chesley, Esquire
WAITE, SCHNEIDER, BAYLESS & CHESLEY
Suite 1513 Central Trust Tower
Fourth and Vine Streets
Cincinnati, OH 45202

David Klingsberg, Esquire
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, NY 10022

via regular US mail

Marc D. Mezibov, Esquire
SIRKIN, PINALES, MEZIBOV & SCHWARTZ
940 4th & Race Tower
Cincinnati, OH 45202

Paul Tobias, Esquire
TOBIAS, KRAUS & TORCHIA
911 Mercantile Library Building
414 Walnut Street
Cincinnati, OH 45202

Gates T. Richards, Esquire
3807 Carew Tower
441 Vine Street
Cincinnati, OH 45202

Vance C. Simonds, Jr., Esq.
Capretz & Kasdan
2091 Business Center Drive, Suite 200
Irvine, CA 92715-1156

Lewis J. Saul, Esquire
7315 Wisconsin Avenue
Suite 601 North
Bethesda, MD 20814

John T. Johnson, Esquire
Calvin, Dylewski, Gibbs, Maddox & Verner, P.C.
1000 Louisiana, Suite 4500
Houston, TX 77002-5012

Brian Wolfman, Esquire
Public Citizen Litigation Group
2000 P Street, N.W. Suite 700
Washington, D.C. 20036

Charles Wolfson, Esquire
CASHMAN & PARTNERS
3rd Floor, 184-190 Day Street
Sydney, Australia NSW 2000

Harry Plotnick, Esquire
Suite 115
9624 Cincinnati-Columbus Road
Cincinnati, OH 45241

Bruce A. Finzen, Esquire
ROBINS, KAPLAN, MILLER & CERESI
1800 International Centre
900 Second Avenue South
Minneapolis, MN 55402-3394

Brian R. Magana, Esquire
MAGANA, CATHCART & McCARTHY
Suite 810 Gateway West Building
1801 Avenue of the Stars
Los Angeles, CA 90067

Hearle D. Scales
1041 Beach Grove Road
Science Hill, KY 42553

/S/_____
LARRY M. KELLER
Attorney for Plaintiff

DATED: September , 1992

APPENDIX S

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. C-1-91-256
	)	
	)	S. ARTHUR SPIEGEL,
Plaintiffs,	)	JUDGE
	)	
v.	)	
	)	
PFIZER, INC., ET AL.,	)	
	/	

MOTION TO INTERVENE

EXPEDITED CONSIDERATION REQUESTED

Elizabeth W. Ridgeway, Rosemary Grunsby and Fred Grunsby, representatives on behalf of the Pennsylvania Class Objectors (hereinafter "Movants"), hereby file the following Motion to intervene under Fed.R.Civ.Pro. 24(a) and 8(e)(2), and state:

1. On June 5, 8 and 9, 1992 and July 22, 1992, the court conducted Fairness Hearings on the Proposed Settlement in this case. The Pennsylvania Class Objectors objected to the Proposed Settlement, and the certification of a class in both their written and oral submissions to the Court.

2. On September 9, 1992, the court entered a

Judgment certifying the settlement class and approving the class settlement.

3. On September 10, 1992, the Court entered an Order appointing special counsel to class counsel. The special counsel who were appointed do not include counsel for the Pennsylvania Class Objectors.

4. On September 16, 1992, the Pennsylvania Class Objectors filed in the Sixth Circuit Court of Appeals a Notice of Appeal from the orders of August 19, 1992 and September 9, 1992.

5. The said appeal was filed based on Movants' status in the case as objecting members of the class who did not opt out and would be bound by the judgment. This Motion is filed under Fed.R.Civ.Pro. 8(e)(2) to establish an alternative status for Movants as intervenors for purposes of challenging the said judgment in this Court and/or on appeal.[1]

6. The representatives of the Pennsylvania Class Objectors are members of the class which was certified herein and therefore have an obvious and indisputable interest in the transaction which is the subject of this action and are so situated that the disposition of this action will as a practical matter impair or impede their ability to protect their individual interests and the interests of the class they

---

[1] From a review of the relevant case law in the Sixth Circuit, it appears that unnamed class members need not obtain leave to intervene before filing an appeal in the context of a class action. *See, Sertic v. Cuyahoga, Lake, etc. v. Carpenters District Council*, 459 F.2d 579, 581 (6th Cir. 1972). Moreover, it appears that the majority of the other circuit courts agree with the Sixth Circuit. Nevertheless, Movants have filed this Motion in an abundance of caution since there is authority in the Fifth and Eleventh Circuits which might be interpreted to stand for a different rule.

represent in the action pending in the Pennsylvania state court.

7. The existing parties to this action and their respective counsel do not adequately represent the interests of the Pennsylvania Class Objectors.

8. The facts and arguments supporting Movants' contention that the existing parties to this action and their respective counsel do not adequately represent the interests of the Pennsylvania Class Objectors have been set forth fully in the Objections, Amended Objections, Brief and the Reply to the Proponents' Submissions, previously filed by the Pennsylvania Class Objectors, as well as in their oral argument, all of which Movants incorporate herein by reference and need not be restated for the record.

9. This Motion to Intervene is timely since it has been filed prior to the expiration of the appeal period for the judgment entered on September 9, 1992 and the judgment was the first order certifying the class after the Fairness Hearing; prior to the Fairness Hearing the certification of that class was conditional.

10. For purposes of this Motion, the Pennsylvania Class Objectors attach as Exhibit "A" the pleading required by Rule 24(c), and then rely on the attached memorandum of law.

WHEREFORE, Elizabeth W. Ridgeway, Rosemary Grunsby and Fred Grunsby, representatives on behalf of the Pennsylvania Class Objectors, respectfully request their Motion to Intervene be granted, that this Motion be granted expedited consideration, and that the Court grant whatever other relief is just and appropriate under the circumstances.

/S/_____
Gary Green
Morton B. Wapner

Larry M. Keller
Attorneys for Pennsylvania
Class Objectors

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street - 12th Floor
Philadelphia, PA 19106
(215) 574-0600

WAPNER NEWMAN ASSOCIATES
115 South 21st Street
Philadelphia, PA 19103-4433
(215) 569-0900

DATED: September 24, 1992

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, ET AL.	)	CASE NO. C-1-91-256
	)	
	)	S. ARTHUR SPIEGEL,
Plaintiffs,	)	JUDGE
	)	
v.	)	
	)	
PFIZER, INC., ET AL.,	)	

/

MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO INTERVENE
EXPEDITED CONSIDERATION REQUESTED

The Movants seek to intervene in this case under Fed.R.Civ.Pro 24(a) to insure that their standing to appeal is not subject to a hypertechnical challenge. Counsel for Movants entered their appearances before the fairness hearing, filed Motions, Objections, and discovery requests and briefs, participated in pre-fairness hearings, discovery hearings and proceedings, and participated as well in the fairness hearings themselves. Movants did not opt-out of the case and therefore are bound as parties to the judgment entered by the court on September 9, 1992. Furthermore, the notice to the class which summoned Movants to the h earing in Cincinnati if they objected to the proposed settlement did not mention any requirement that to participate, protect their rights or to appeal, a class member would be obliged to intervene.

Moreover, in two decisions of the Sixth Circuit, the

Court addressed the specific question of: when an objecting class member appears in Court pursuant to a notice issued under Fed.R.Civ.Pro. 23(e), must the class member intervene to have standing to appeal an adverse ruling on his objections. The Sixth Circuit ruled convincingly that a class member has standing to appeal and need not intervene. *Sertic v. Cuyahoga Lake Etc. v. Carpenters Dist. Court*, 459 F.2d 579, 581 (6th Cir. 1972); *Cohen v. Young*, 127 F.2d 721, 724 (5th Cir. 1942) [class member has the same standing to appeal after receiving notice under Rule 23(e), as a defendant summoned by process; objecting class members are permitted to appeal as of right. *Sertic, supra*, 459 F.2d at 582, *citing Cohen, supra*, and *United States v. American Society of Composers*, 442 F.2d 601, 605 (2d Cir. 1971)].

In addition, an overwhelming majority of the circuit courts of appeals have followed the Sixth Circuit's rule. For example, the Seventh Circuit ruled in *Ragsdale v. Turnock*, 941 F.2d 501, 506 (7th Cir. 1991):

> Members of a class whose rights will by operation of res judicata be extinguished by the settlement of the class action of course have standing to object to the settlement and to press their objections on appeal, but like other litigants they must show that the order to which they object actually harms them. Ordinarily the harm arises from the fact that the settlement does not provide the class with as much relief as the objecting member had wanted.

See also, Silber v. Mabow, 957 F.2d 697, 700 (9th Cir. 1992) [class member who timely objected to proposed class settlement has standing for a direct appeal from entry of final judgment approving the settlement; *citing* 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1797 at 360-61 (2d ed. 1986); *Binker v.*

Commonwealth of Penna, Nos. 91-5745, 91-5746, 91-5942, slip op. Sept. 22, 1992 (3rd Cir.), 1992 U.S. App. Lexis 22928.

In addition, the same rule has been reported by the leading commentators and legal text book authors: 2 Newberg on Class Actions § 11-59; Class Actions; Law and Practice § 28:03 (Callaghan) ["In most instances, class members or stockholders who object to a proposed settlement during the approval hearing in the district court will have standing to appeal an order approving the settlement (citing cases)].

In light of this heavy authority, which would hold that Movants have standing to ask the Sixth Circuit to review this Court's adverse rulings on Movants' objections, why do Movants now move under Fed.R.Civ.Pro. 8(e)(2) to allow them the alternative status of intervenors?

The answer is found in a strange and anomalous case, *Walker v. Mesquite,* 858 F.2d 1071, 1073 (5th Cir. 1988), where the Court ruled that non-named class members do not possess standing to appeal the final judgment in a class action. The Court in *Walker* based this ruling on its belief that the class member has available the collateral avenue of relief of filing a motion to intervene under Rule 24(a)(2).[1]

---

[1] There are many arguments which undermine the authority and correctness of *Walker*, including the fact that while *Walker* involved a settlement and a consent decree, it supposedly based its opinion on the rule of law in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987) which was a case tried to verdict with an injunction entered by the Court (as opposed to a settlement). The Court in *Guthrie* explained that its rule applied only to a class action which was *litigated* to judgment, and it distinguished the situation where the parties settled, stating, 815 F.2d at 629:

> Parrott also contends that his appeal is properly before this Court since the district court did not

The Eighth Circuit in *Croyden Associates v. Alleco*, 969 F.2d 675 (8th Cir. 1992) adopted the rule of *Walker*, thus requiring intervention by a class member, but reserved the question of whether intervention is required when adequacy of representation is one of the grounds for the objection. The Court in *Croyden* stated:

> We need not consider whether intervention is necessary to assert a claim of inadequacy of class representation, and we will leave consideration of this question for another day.

> afford him notice and an opportunity to object to entry of the judgment pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. Since the district court's final order is not a consent decree, however, there is no merit to the contention that the district court was required to give individual class members notice and an opportunity to file objections pursuant to Rule 23(e). For this reason, there is also no merit to his contention that dissenters to a class action settlement may retain new counsel to appeal the district court's approval of a consent decree. *See Pettway*, 576 F.2d at 1180; *Cotton v. Hinton*, 559 F.2d 1326, 1329 (5th Cir. 1977); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 n. 19 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S. Ct. 1462, 47 L. Ed. 2d 734 (1976).

Thus the court in *Walker* adopted *Guthrie's* language but failed to observe that *Guthrie* did not apply in a settled case.d

There are numerous other reasons why it could be argued that *Walker* is *bad law* and would not be accepted by the Sixth Circuit, but is not necessary or fruitful to prolong the discussion here.

Accordingly, in light of the split of authorities, notwithstanding that the Sixth Circuit has already spoken and allowed an appeal by objecting class members, Movants request that the Court allow them to intervene. This Motion is consistent with the command of Fed.R.Civ.Pro. 1, and would avoid the need for Movants to institute a new collateral lawsuit in the district court to accomplish the very same purpose that they seek on appeal: a fair chance to have this Court's Order and Judgment reviewed.

On September 9, 1992, the Court entered a judgment approving the class settlement and certifying the class. Prior to that time, no orders were entered by the Court certifying the class. The instant Motion to Intervene is being filed within sixteen (16) days of the entry of the judgment and thus it is timely. In the seminal case of *United Airlines, Inc. V. McDonald*, 432 U.S. 385 (1977) the Supreme Court held that a motion to intervene by a putative class member after entry of judgment for purposes of appeal was timely and should be granted. As the Supreme Court stated in *United Airlines*, at pg. 394:

> The critical fact here is that once the entry of final judgment made the adverse class determination appealable, the respondent quickly sought to enter the litigation. *In short, as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests.* (Footnote omitted) (emphasis added).

The Supreme Court observed in *United Airlines* that the requirement of acting promptly in filing the motion to intervene is satisfied when the movant files the appeal within the time period in which the named plaintiffs could have taken

an appeal. *Id.*, at 396.

By any standard, the instant Motion to Intervene is timely filed even using the date of the August 19, 1992 Order. Under the Supreme Court's ruling in *United Airlines*, any motion to intervene filed within the appeal period of the judgment is deemed to be timely filed.

The Sixth Circuit in *Triax C ompany, et al. v. TRW, Inc., et al.*, 724 F.2d 1224 (6th Cir. 1984), adopted the reasoning and rationale of the *United Airlines* case by holding that intervention is proper for purposes of appeal only. In *Triax*, the motion to intervene was filed on the last day for filing a notice of appeal. In contrast, the instant motion is being filed within sixteen (16) days of the entry of the judgment. Further, until a judgment was entered in this case, there was no reason to file a motion to intervene.

The suggestion in *Walker* that objectors do not have standing to appeal unless they are named plaintiffs would require the Pennsylvania Class Objectors to file a new action in this Court. This is clearly contrary to Fed.R.Civ.Pro. 1, which requires that every action he handled as expeditiously as possible. Filing a new action on behalf of the Pennsylvania Class Objectors would be a senseless waste of resources. Further, nobody will be prejudiced by the granting of the instant motion. Throughout the fairness hearings (and before) all the parties knew the Pennsylvania Class Objectors' position in this matter and had strong reason to believe that they would likely file an appeal if their objections were overruled. The only other objecting party is Public Citizen, who only appeared an amicus in this case. Thus, Movants' Motion to Intervene is timely and does not threaten prejudice to any other party.

For all of the foregoing reasons, as well as those set forth in the attached Motion, Movants respectfully request that their Motion to Intervene be granted, that this Motion be granted expedited consideration, and that the Court grant

whatever other relief is just and appropriate under the circumstances.

/S/_____
Gary Green
Morton B. Wapner
Larry M. Keller
Attorneys for Pennsylvania
Class Objectors

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street - 12th Floor
Philadelphia, PA 19106
(215) 574-0600

WAPNER NEWMAN ASSOCIATES
115 South 21st Street
Philadelphia, PA 19103-4433
(215) 569-0900

CERTIFICATION OF SERVICE

I, Larry M. Keller, Esquire, hereby certify that I served a true and correct copy of the foregoing document on the following:

via overnight delivery service

Stanley M. Chesley, Esquire
WAITE, SCHNEIDER, BAYLESS & CHESLEY
Suite 1513 Central Trust Tower
Fourth and Vine Streets
Cincinnati, OH 45202

David Klingsberg, Esquire
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, NY 10022

via regular US mail

Marc D. Mezibov, Esquire
SIRKIN, PINALES, MEZIBOV & SCHWARTZ
940 4th & Race Tower
Cincinnati, OH 45202

Paul Tobias, Esquire
TOBIAS, KRAUS & TORCHIA
911 Mercantile Library Building
414 Walnut Street
Cincinnati, OH 45202

Gates T. Richards, Esquire
3807 Carew Tower
441 Vine Street
Cincinnati, OH 45202

Vance C. Simonds, Jr., Esq.
Capretz & Kasdan
2091 Business Center Drive, Suite 200
Irvine, CA 92715-1156

Lewis J. Saul, Esquire
7315 Wisconsin Avenue
Suite 601 North
Bethesda, MD 20814

John T. Johnson, Esquire
Calvin, Dylewski, Gibbs, Maddox & Verner, P.C.
1000 Louisiana, Suite 4500
Houston, TX 77002-5012

Brian Wolfman, Esquire
Public Citizen Litigation Group
2000 P Street, N.W. Suite 700
Washington, D.C. 20036

Charles Wolfson, Esquire
CASHMAN & PARTNERS
3rd Floor, 184-190 Day Street
Sydney, Australia NSW 2000

Harry Plotnick, Esquire
Suite 115
9624 Cincinnati-Columbus Road
Cincinnati, OH 45241

Bruce A. Finzen, Esquire
ROBINS, KAPLAN, MILLER & CERESI
1800 International Centre
900 Second Avenue South
Minneapolis, MN 55402-3394

Brian R. Magana, Esquire
MAGANA, CATHCART & McCARTHY
Suite 810 Gateway West Building
1801 Avenue of the Stars
Los Angeles, CA 90067

Hearle D. Scales
1041 Beach Grove Road
Science Hill, KY 42553

/S/_____
LARRY M. KELLER
Attorney for Plaintiff

DATED: September 24, 1992

EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING)	**CASE NO. C-1-92-256**
SONJA LEE BOWLING)	
1231 Wainwright Drive)	**S. ARTHUR SPIEGEL**
Cincinnati, OH 45246)	
and)	
JULIE WHYLE and)	**COMPLAINT IN**
JEFFREY JAMES WHYLE)	**INTERVENTION**
8421 Flamingo Lane)	
Cincinnati, OH 45239)	
and)	
JANET BOGGESS and)	
LAWRENCE BOGGESS)	
3735 Sandle Lane)	
Cincinnati, OH 45248)	
and)	
EMMA CAROLYN)	
WRIGHT)	
JACKIE WRIGHT)	
614 South Scott Street)	
Madisonville, KY 42431)	
and)	
ARCHIE CALVERT and)	
WANDA CALVERT)	
85 North Russell Drive)	
Madisonville, KY 42431)	
and)	
JAMES PAULEY and)	
ELAINE PAULEY)	
913 Grapevine Road)	

Madisonville, KY 42431)
)
ON BEHALF OF)
THEMSELVES and ALL)
OTHERS SIMILARLY)
SITUATED)
Plaintiffs and)
Intervenors')
Defendants,)
v.)
PFIZER, INC.)
232 East 42nd Street)
New York, NY 10017)
and)
SHILEY, INC.)
17600 Gillette Avenue)
Irvine, CA 92714)
Defendants and)
Intervenors')
Defendants,)

---

and)
ELIZABETH W.)
RIDGEWAY)
108 Trenton Avenue)
Cape May, NJ)
and)
ROSEMARY GRUNSBY)
7038 Roosevelt Boulevard)
Philadelphia, PA 19144)
and)
FRED GRUNSBY)
7038 Roosevelt Boulevard)
Philadelphia, PA 19144,)
Intervenors.)

JURISDICTION

1. This Court has already accepted jurisdiction of this action and under Fed.R.Civ. Pro. 8(a)(1), no new grounds to support jurisdiction need to be alleged.

PARTIES

2. Intervenor, Elizabeth W. Ridgeway, is an individual who is a citizen of the state of New Jersey residing at the address stated above.

3. Intervenor, Rosemary Grunsby, is an individual who is a citizen of the Commonwealth of Pennsylvania residing at the address stated above.

4. Intervenor, Fred Grunsby, is an individual who is a citizen of the Commonwealth of Pennsylvania residing at the address stated above. At all times material hereto, plaintiff was the husband of plaintiff Rosemary Grunsby.

5. The parties identified as "intervenors" seek to intervene for themselves and on behalf of the class they represent in a state court class action filed in Pennsylvania, the facts and details of which have been placed in the record previously and which are incorporated herein by reference.

6. The original parties to this action have been identified in the Amended Complaint and that information is incorporated herein by reference. The said original parties are named herein as "intervenors' defendants' for convenience because as proponents of the settlement and class certification, as set forth in this Court's judgment dated September 9, 1992, their interests *inter se* are aligned against the interests of the intervenors.

CLAIMS

7. The claims of intervenors have been presented

to the Court previously in intervenors' status as objecting class members. Intervenors have previously been identified as the "PA Class Objectors" and "clients of the Green firm." Intervenors incorporate by reference their Objections and Amended Objections filed on May 26, 1992; the brief of the PA Class Objectors filed on June 2, 1992; the Reply of the PA Class Objectors to Proponents' Submissions filed on July 8, 1992; other pleadings filed on behalf of the PA Class Objectors in this action; and all their oral arguments in court.

8. Proponents-Intervenors have appeared and have participated in this action as objectors and for the purpose of pursuing objections to the class certification and approval of the settlement.

9. In accordance with Fed.R.Civ.Pro. 8(e)(2), intervenors seek as an alternative to their status as objecting class members who did not opt out to become also intervenors under Fed.R.Civ.Pro. 24(a) for purposes of proceedings in this Court and/or on appeal.

10. The interests of the PA Class Objectors are not being adequately represented in this action by the named original plaintiffs and their counsel.

11. Intervenors incorporate by reference their Motion seeking intervention filed with this pleading.

WHEREFORE, intervenors respectfully request that the relief they requested as objecting class members in their objections and motions in opposition to the proposed settlement and class certification (which are incorporated by reference), be deemed as well requests for relief as intervenors; that the Court grant that relief; and that the Court provide whatever other relief that is just and appropriate under the circumstances.

Respectfully submitted,

/S/_____
Gary Green
Morton B. Wapner
Larry M. Keller
Attorneys for
PA Class Objectors

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street - 12th Floor
Philadelphia, PA 19106
(215) 574-0600

WAPNER NEWMAN ASSOCIATES
115 South 21st Street
Philadelphia, PA 19103-4433
(215) 569-0900

DATED: September 24, 1992

Supreme Court, U.S.
FILED
AUG 1 1997
CLERK

No. 97-47

In The

Supreme Court of the United States

October Term, 1996

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

vs.

PFIZER INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PLAINTIFFS' CLASS, BOWLING, *et al.*

Of Counsel:

FAY E. STILZ
WAITE, SCHNEIDER, BAYLESS
& CHESLEY CO., L.P.A.
1513 Central Trust Tower
Cincinnati, Ohio 45202
(513) 621-0267

STANLEY M. CHESLEY
Counsel of Record
WAITE, SCHNEIDER, BAYLESS
& CHESLEY CO., L.P.A.
1513 Central Trust Tower
Cincinnati, Ohio 45202
(513) 621-0267

Attorneys for Respondents Plaintiffs' Class, Bowling, et al.

71639

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, inc.

QUESTIONS PRESENTED

1. Whether petitioners may petition a third time for review of the December 21, 1993 decision of the Court of Appeals for the Sixth Circuit that petitioners, as unnamed class members who neglected to intervene, have no standing to challenge the judgment approving the *Bowling* class action settlement, when the issue was not before the Court of Appeals for the Sixth Circuit in the current appeals?

2. Whether the district court properly exercised its discretion in establishing a protocol pursuant to Fed. R. Civ. P. 54(d)(2)(A), (B), (C) and (D) for hearing pending applications by attorneys for awards of attorneys' fees and expenses from a class action common fund?

3. Whether the district court properly exercised its discretion in denying the application of petitioners-attorneys Sidkoff, Pincus & Green, P.C. and Wapner, Newman & Wigrizer, for an award of attorneys' fees and expenses from a class action common fund upon the basis that petitioners did not contribute any financial benefit to the plaintiff class through their activities in the *Bowling* litigation?

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STATEMENT OF THE CASE

Bowling, et al. v. Pfizer Inc., et al., the litigation from which the instant petition arises, is a product liability class action which was brought on April 19, 1991 by living recipients implanted with the Bjork-Shiley Convexo/Concave Heart Valve and their spouses. The Convexo/Concave Heart Valve was manufactured by defendant Shiley Incorporated, a wholly-owned subsidiary of defendant Pfizer Inc. Plaintiffs' class alleges that the Convexo/Concave Heart Valve is inherently defective in that the product has a propensity to fracture. Plaintiffs' class included approximately fifty thousand (50,000) valve recipients residing world-wide.

A settlement of the case was reached in 1992 and the order of the district court approving settlement is final. *Ridgeway v. Pfizer Inc.*, 115 S. Ct. 294 (1994). The settlement is currently being implemented and more than One Hundred Million Dollars has already been distributed to and for the benefit of claimant class members.

Petitioners are neither named parties nor intervenors to the *Bowling* litigation, but merely two valve recipients and one spouse who are class members, and their private counsel. To date, petitioners have filed seven appeals before the Court of Appeals for the Sixth Circuit and three petitions for certiorari before the United States Supreme Court. All prior appeals have been dismissed or denied and the two prior petitions for certiorari have been denied.

Petitioners filed their own state court class action, *Taylor v. Shiley*, in February 1986, on behalf of Convexo/Concave Heart Valve recipients residing in Pennsylvania, only, with large (but not small) valves, who did not have pending lawsuits. (R. 143, Ex. D: Second Amended Complaint In *Taylor v. Shiley*, at p.

34).[1] In September, 1989, more than three years after initial filing of their Pennsylvania lawsuit, petitioners first moved for class certification. Their motion for certification remained pending before the state court for eight years until summary judgment in favor of defendant was granted on the grounds of res judicata on July 3, 1997. No class was ever certified in the state court action. No class counsel were appointed in the action and no communication with members of that putative class ever was undertaken or ordered by the state court. No class settlement was negotiated in *Taylor v. Shiley*.

On January 23, 1992, the *Bowling* case was conditionally certified as a Rule 23(b)(3) opt-out class action by the district court. (R. 48: Order Certifying The Conditional Settlement Class And Scheduling A Fairness Hearing). Class counsel and counsel for defendants entered into a proposed settlement agreement. Subsequent to the issuance of appropriate notice to the class, the proposed settlement agreement was the subject of extensive fairness hearings before the district court on June 5, 8, 9, 1992 and July 22, 1992. In accordance with the notice provided the class, any class member who wished to participate during the hearings was permitted to do so. The court also permitted non-class members claiming an interest in the outcome to participate, including the representatives of consumer groups. As indicated by the transcripts of proceedings (R. 202: Transcript of 6/5/92 Fairness Hearing; R. 207: Transcript of 6/8/92 Fairness Hearing; R. 208: Transcript of 6/9/92 Fairness Hearing; R. 224: Transcript of 6/9/92 Fairness Hearing; and R. 251: Transcript of 7/22/92 Fairness Hearing), the district court heard from more than forty different American and foreign counsel and individuals, as well as considering written communications to the court by class members who could not be present. A substantial evidentiary record was created. Petitioners statement to the contrary is false. No person who desired to be heard was refused.

1. Citations to the record are to the district court docket numbers.

Petitioners received class notice of the *Bowling* settlement in February, 1992, and the complete text of the proposed agreement was available for their inspection. On February 26, 1992, less than one month after the proposed settlement had been reached, petitioners provided the state court with a status report wherein petitioners advised the state court of the *Bowling* proposed settlement and indicated that petitioners were meeting with defendants regarding the terms of the settlement. Moreover, the district court granted petitioners' request for written discovery of the terms of the settlement from class counsel and defendants prior to the fairness hearings.

Petitioners were given three opportunities to opt-out of the *Bowling* settlement. Yet, petitioners each time affirmatively elected to remain within the *Bowling* settlement class. (R. 224: Transcript of 6/9/92 Fairness Hearing, at pp. 92-95; R. 251: Transcript of 7/22/92 Fairness Hearing, at p. 83).

On August 19, 1992, the district court issued a sixty-eight page Order Finding The Proposed Settlement To Be Fair. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992). On September 10, 1992, the district court entered its Judgment Certifying The Settlement Class And Approving The Class Settlement. (R. 255: Judgment Certifying The Settlement Class And Approving The Class Settlement).

On September 17, 1992, petitioners filed their notice of appeal to the Court of Appeals for the Sixth Circuit. (R. 258: Notice Of Appeal). Petitioners were the only class members to appeal the district court's rulings. Petitioners did not seek to intervene prior to filing a notice of appeal.

On September 25, 1992, petitioners filed a belated motion to intervene in the district court, despite the fact that their filing of a notice of appeal had already divested the district court of

jurisdiction. By memorandum decision dated November 9, 1992, the district court determined that it could not decide the motion to intervene because of lack of jurisdiction. Petitioners appealed from the district court's memorandum decision also.

On March 2, 1993, while petitioners' appeal was pending, petitioners filed a motion under Fed. R. Civ. P. 60(b) requesting the district court reconsider its approval of the class settlement. (Pet. App. at 156). By Order dated March 26, 1993, the district court concluded there was no basis to request a remand from the Court of Appeals for a multitude of reasons including that matters raised in the motion were already considered by the court in approving the settlement; many of the allegedly "newly discovered" matters were actually known by petitioners, or with reasonable diligence could have been discovered at the time of the fairness hearing, or were actually discussed at the fairness hearing; much of the "newly discovered evidence" consisted of newspaper articles. (R. 335: Order). Petitioners appealed. (R. 337: Notice Of Appeal). On June 9, 1993, the Sixth Circuit dismissed the appeal because the District Court's order declining to request a remand from the Court of Appeals was not an appealable order.

On December 21, 1993, the Sixth Circuit issued two Orders. The first Order affirmed the district court's determination that it lacked jurisdiction to rule on the motion to intervene while petitioners' appeal was pending. The second Order dismissed the principal appeal. Citing to *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987), *Croyden Associates v. Alleco*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993), and *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988), the Court of Appeals held that because the petitioners "are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." (Pet. App. at 299). Petitioners then petitioned for rehearing *en*

banc, relying upon *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942) and an alleged inconsistency between *Cohen* and the more recent unpublished decisions of the Sixth Circuit. Respondents were asked to file a response, addressing these specific allegations, and did so.

On March 4, 1994, the Court of Appeals denied the petition for rehearing *en banc*, noting that the petition had been circulated among all active judges of the Sixth Circuit, and that "no judge . . . requested a vote on the suggestion for rehearing en banc." The Court further stated that the original hearing panel had "further reviewed the petition for rehearing and [had] conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." Petitioners then filed a petition for writ of certiorari with this Court, presenting the question of whether unnamed, nonintervening class members have standing to appeal from a judgment approving a class settlement. The petition was denied on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 294 (1994). Upon denial of the petition, the judgment approving the class settlement became final, and the district court instituted implementation of the settlement agreement.

Prior to the filing of the aforementioned petition and during the time period the district court regained jurisdiction, the district court ruled upon petitioners' pending motions. On April 5, 1994, the court denied petitioners' motion to intervene "because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class." (R. 363: Order Denying Motion To Intervene). Petitioners did not appeal from the order denying intervention. Instead, on April 13, 1994, they filed a motion in the district court under Fed. R. Civ. P. 59(e) for reconsideration of the denial of their motion to intervene. (R. 371: Motion By Class Objectors Ridgeway And Grunsby

For Order To Alter/Amend Order Dated 4/5/94 And Allowing Movant To Intervene).

On April 12, 1994, the district court denied petitioners' Rule 60(b) motion stating, "This complex and far-reaching settlement agreement was approved after exhaustive consideration and after the Court conducted fairness hearings on June 5, 8 and 9, 1992 and July 22, 1992. We have now thoroughly reconsidered our decision approving this settlement and conclude that after careful review of the Objectors' motion, and further review of our 68 page Order approving the settlement, we hereby conclude that the interest of justice dictates that the Objectors' motion be, and is hereby, denied." (R. 368: Order Denying Motion Under Fed. R. Civ. P. 60(b). On May 3, 1994, petitioners filed a notice of appeal from that decision. On August 8, 1994, the Sixth Circuit dismissed the petitioners' appeal upon the basis that petitioners were nonparty class members who were denied intervenor status, who were already found by the Court of Appeals to lack standing to appeal the settlement, and who likewise lacked standing to appeal the denial of their Rule 60(b) motion whereby they sought once again "to vacate the very settlement as to which this court earlier concluded the appellants lacked standing to challenge". Petitioners' motion for remand was denied as moot. Petitioners then filed another petition for certiorari, which was denied on January 9, 1995. *Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 780 (1995).

On November 25, 1994, the district court denied petitioners' motion for reconsideration of the denial of their motion to intervene. (Pet. App. at 141). Petitioners filed another appeal therefrom. The district court's denial of reconsideration was affirmed by the Court of Appeals and while this ruling is one of the issues identified in the instant petition for certiorari, petitioners have not addressed the issue in their discussion of the reasons for granting the writ. Plaintiffs-respondents, therefore, have likewise not addressed the issue hereinafter.

In 1992, after approving the *Bowling* settlement, the district court indicated that applications for awards of attorneys' fees and expenses from the class action common fund should be filed with the court. In conjunction therewith, petitioners were afforded the opportunity to review all fee applications and supporting documentation and to submit adversarial responses. (Pet. App. at 141; R. 489: Civil Minutes; R. 514: Order Concerning Further Discovery). Petitioners were granted the right to conduct discovery with respect to fee issues and to participate before the district court when discovery issues were addressed and the scope of discovery was determined. (Pet. App. at 141; R. 489: Civil Minutes; R. 514: Order Concerning Further Discovery). Petitioners declined to actively participate except to file their own *pro forma* attorneys' fee application.

As a result of petitioners' numerous appeals, consideration of these applications was delayed until 1995.[2] A hearing on those applications deemed meritorious was set for September 14, 1995 before the Hon. John F. Nangle, sitting by designation of Chief Justice William H. Rehnquist. (Pet. App. at 7; Pet. App. at 137). The trial court, the Hon. S. Arthur Spiegel, requested the designation of Judge Nangle for this limited purpose and for specific tasks delineated in the Order of Transfer (Pet. App. at 135) filed August 3, 1995 and the supplemental clarification thereto filed September 1, 1995 (Pet. App. at 11). The designation was temporary; the trial court did not recuse itself; and the trial court did not request the participation of Judge Nangle for reasons of "conflict of interest" or a "personal relationship with class counsel". Petitioners' allegations to the contrary are completely misrepresentative of the reasons for the

2. Also, on July 6, 1995, the lower court granted intervenor status to three nonparty class members, Crane, *et al.*, on attorneys' fees and expense issues. *Amicus*, Public Citizen, had also been granted the right as early as 1992 to participate in fee and expenses issues. (R. 586: Order Granting Motion To Intervene On Renewed Motion Of Gary Crane, *et al.*).

trial court's actions. Prior to the hearing, four orders were issued dated August 14, 1995 (later rescinded), September 1, 1995 and September 5, 1995. Three of these orders were entered by Judge Nangle. One order was entered by Judge Spiegel. The orders established a hearing date and additional protocol for pending applications for awards of attorneys' fees and costs from the class action common fund, whereby petitioners were granted the right to file any further additional memoranda, exhibits or other evidence in support of their position(s) as to any pending fee applications and to participate in the development of factual stipulations in preparation for the fee hearing. (Pet. App. at 7). Petitioners ultimately declined to exercise any of these rights. Additionally, a variety of last minute motions, filed by petitioners after the discovery cut-off date and approximately two weeks prior to the scheduled hearing, were denied. The district court also determined which of the applications filed were meritorious and which applications would, or would not, be considered at the September 14, 1995 hearing. The applications filed by petitioner law firms were deemed not meritorious and were denied upon the basis that petitioner law firms did not contribute any financial benefit to the plaintiff class in their activities in the litigation. (Pet. App. at 11).

The public, adversarial hearing took place on September 14, 1995. Opposition to the fee applications of class counsel and special counsel was provided by intervenors Crane, *et al.* and *Amicus* Public Citizen. Thereafter, petitioners appealed all four orders of the district court. The decisions of the district court were affirmed by the Court of Appeals for the Sixth Circuit and these rulings also constitute issues presented in the instant petition for certiorari.

SUMMARY OF REASONS FOR DENYING THE WRIT

The question of petitioners' appellate standing presented by the petition was resolved by this Court in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988). In accordance therewith, petitioners have twice been found to be nonparty, nonintervening class members who lack standing to appeal the *Bowling* settlement. *Bowling v. Pfizer, Inc.*, Appeal No. 92-3973, December 21, 1993, *cert. denied, Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 294 (1994); *Bowling v. Pfizer, Inc.*, Appeal No. 94-3519, August 8, 1994, *cert. denied, Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 780 (1995).

The facts underlying this petition are so unique and particular to this matter that the case is not suitable for review by the Supreme Court, to wit: three nonparty, nonintervening petitioners are the sole class members seeking to overturn a class settlement approved five years ago, which is now final and in its third year of implementation and through which in excess of One Hundred Million Dollars has already been distributed to and for the benefit of claimant class members; it has already been determined, with finality, that petitioners lack standing to appeal the settlement; the settlement which petitioners seek to overturn is one in which petitioners affirmatively elected to participate after being given three opportunities to opt-out; petitioners had their own separate lawsuit (*Taylor v. Shiley*) pending against defendants in a Pennsylvania state court; the protocol and procedure established for the attorneys' fee hearing was developed in recognition of the facts and circumstances specific to this case; and the denial of petitioners' attorneys' fee application was based upon the district court's particular factual familiarity, developed over a four year time span, with petitioners' course of conduct and acknowledged purpose for participation.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT APPLIED PRINCIPLES OF APPELLATE PROCEDURE ESTABLISHED BY THIS COURT AND CONSISTENTLY FOLLOWED BY THE COURTS OF APPEAL.

Petitioners' argument regarding their standing to challenge the *Bowling* settlement is not properly before this Court. The issue was not the subject matter of the appeals before the Sixth Circuit from which the instant petition for writ of certiorari arises. Petitioners are merely using their latest round of appeals to bring the issue before this Court for the third time. Irrespective, the question of petitioners' standing to appeal the *Bowling* settlement has already been resolved by this Court in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988). Therein, the Court specifically and conclusively held that only individuals who are parties, or those who properly become parties, may appeal an adverse judgment. Citing to *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) (appeal from denial of class action certification), this Court also rejected the suggestion made by the Second Circuit that there could be exceptions to this rule, finding instead that a nonparty is to seek intervention for purposes of appeal.

Subsequent to *Marino*, every Court of Appeals presented with an appeal from a class action judgment brought by nonparty class members has ruled that such individuals do not have standing to appeal. *See Shults v. Champion International Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco*, 969 F.2d 675, 679 (8th

Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988).

Petitioners' argument that there is a "split" among the circuits as to the issue of a nonparty class member's standing to appeal a judgment approving a class settlement is unfounded and has been manufactured for purposes of this petition. In support of such an allegation, petitioners rely upon decisions rendered prior to *Marino*; cases having completely unrelated factual and/or procedural circumstances and which do not stand for the proposition asserted by petitioners; and shareholder derivative cases which have been deemed "inapposite" to class actions. *Gottlieb*, 11 F.3d at 1010-11 (10th Cir. 1993); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1308 (3rd Cir. 1993). Petitioners' statement that the Court of Appeals for the Second Circuit made a "call" in 1996 for Supreme Court resolution of the alleged "split" among the circuits in *State of N.Y. By Vacco v. Reebok Int'l Ltd.*, 96 F.3d 44 (2nd Cir. 1996) is grossly misrepresentative. The Second Circuit, upon determining the issue of standing in a *parens patriae* matter, noted only that there was a "dearth of authority on the issue of unnamed beneficiaries' appellate standing in *parens patriae* cases", requiring the attorneys involved to cite to the divergent rules applicable to class actions and derivative actions in support of their particular positions on the issue. *Id.* at pp. 47-48.

The requirement of intervention is fully supported by the language and underlying policies of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. In *Marino*, this Court relied upon the text of the Federal Rules of Appellate Procedure in holding that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." 484 U.S. at 304. As the Court stated, Fed. R. App. P. 3(c) specifically requires that the notice of appeal specify the

"party or parties" taking the appeal. *Id.* Further, it is well-recognized that class members who disagree with the course of a class action have adequate procedures available to them through which they can protect their interests. Procedures applicable include intervention and the right to opt-out of a case designated as a Rule 23(b)(3) class action.[3] Also, class actions would become unmanageable and non-productive if each member could individually decide to appeal, thereby defeating the very purpose of class action lawsuits. *See Croyden*, 969 F.2d 675; *Walker*, 858 F.2d 1071; *Guthrie*, 815 F.2d 626.

II.

THE UNIQUE AND UNUSUAL FACTS OF THIS CASE MAKE IT UNSUITABLE FOR REVIEW BY THIS COURT.

The facts underlying this petition are so unique and particular to this matter that the case is not suitable for review by the Supreme Court. No broader issue is presented. As discussed *supra*, three nonparty, nonintervening petitioners are the sole class members seeking to overturn a class settlement approved five years ago, which is now final and in its third year of implementation and through which in excess of One Hundred Million Dollars has been distributed to and for the benefit of claimant class members; it has already been determined, with

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3. The "opportunity to opt-out after knowing the terms of a proposed settlement is unusual in the class action context and serves to protect the interests of class members." *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977). Class members are in an advantageous position because "they [know] the terms of the settlement before having to decide whether to opt out." *Weinberger v. Kendrick*, 698 F.2d 61,72 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 175 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (in making an opt-out decision, settlement class members "can benefit from the specific knowledge of the amount of recovery they can expect from remaining in the class".).

finality, that petitioners lack standing to appeal the settlement; the settlement which petitioners seek to overturn is one in which petitioners affirmatively elected to participate after being given three opportunities to opt-out; and petitioners had their own separate lawsuit (*Taylor v. Shiley*) pending against defendants in a Pennsylvania state court. In addition thereto, and as discussed below, the protocol and procedure established for the attorneys' fee hearing was developed in recognition of the facts and circumstances specific to this case, and the denial of petitioners' attorneys' fee application was based upon the district court's particular factual familiarity, developed over a four year time span, with petitioners' course of conduct and acknowledged purpose for participation.

In the *Bowling* case, the district court properly exercised its discretion in establishing a protocol for determining awards of attorneys' fees and expenses from the class action common fund. The requirements of Fed. R. Civ. P. 54(d)(2)(A), (B), (C) and (D) which address the protocol for determining claims for awards of attorneys fees and expenses were followed.

Petitioners have attempted to create the false impression that the protocol established by the district court for the submission and hearing of attorney fee applications was established in large part only several weeks prior to the actual fee hearing, that petitioners were denied participation, and that an evidentiary hearing did not take place. To the contrary, the protocols and procedures adopted span a three year time period from 1992 through 1995; petitioners had the right of extensive participation; and a hearing with submissions of evidence where opposing interests were afforded the opportunity to be heard did take place. A description of these protocols and procedures follows.

At the close of the *Bowling* fairness hearings, on July 22,

1992, the lower court indicated that any counsel who wished to submit an application for an award of fees and expenses should do so and that any counsel who had entered an appearance in *Bowling* would be permitted to respond to any application filed. (R. 251: Transcript of 7/22/92 Fairness Hearing at pp. 152, 174). Thus, in October, 1992, the first motions requesting awards of fees and expenses were filed with the district court.

Concurrent with the filing of applications for awards of fees and expenses, the district court also permitted discovery of the attorneys who submitted applications for awards of fees and expenses. Accordingly, in 1992, the first discovery requests were made of class counsel and special counsel by *Amicus* Public Citizen. While petitioners did not serve class counsel or special counsel with original discovery requests, during November, 1992, petitioners served upon class counsel and special counsel notices of joinder in the interrogatories and document requests originally served by *Amicus* Public Citizen. In accordance therewith and despite the stay discussed below, class counsel and special counsel, at all times served petitioners with all discovery materials served upon Public Citizen.

After the filing of original fee applications and during initial discovery, all fee matters were stayed as a result of the appeals filed by petitioners. (R. 297: 11/9/92 Memorandum Decision).

On November 24, 1994, after denial of *certiorari* by the United States Supreme Court, the district court lifted the stay and ruled that discovery in regard to attorneys' fees could again take place. A June 1, 1995 discovery deadline was set and the district court further ruled that all motions in regard to attorney's fees were to be filed with the court by July 15, 1995. (Pet. App. at 141).

On July 6, 1995, the district court granted intervenor status

to nonparty class members Crane, *et al.* on attorneys' fees and expense issues to represent the adverse interests of the class. Intervenors were represented by counsel for *Amicus* Public Citizen who had, in 1992, previously been granted the right to participate in fee and expense issues and also represent the adverse interests of the class. (R. 586: Order Granting Motion To Intervene On Renewed Motion Of Gary Crane, *et al.*).

All named parties, intervening parties and *Amicus* Public Citizen complied with the above referenced orders and deadlines established by the district court. All discovery being concluded and all original fee applications with appropriate supplementation having been filed, the Hon. John F. Nangle held a brief status conference via telephone on August 4, 1995 with all parties, named and intervening, and the *Amicus*, wherein the court indicated that a fee hearing would be set and a protocol established.[4]

Thereafter, the district court issued an Order Setting Hearings On Applications For Attorneys' Fees (Pet. App. at 14). This Order was then rescinded and the Amended Order Setting Hearings On Applications For Attorneys' Fees And Costs was issued on September 5, 1995 (Pet. App. at 7). Hearing was set for September 14, 1995 on all applications for attorneys' fees and expenses which had been found preliminarily meritorious as having benefitted the plaintiffs' class. A protocol was also established for the hearing. One attorney was to speak on the behalf of each of the fee applications being considered. Additional objections or documentation were to be filed with the court, with supporting memoranda, no later than September 8, 1995. Any interested party was permitted to file exhibits or

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4. Petitioners have incorrectly alleged that this status conference was an *ex parte* telephone conversation. All parties and the *Amicus* were represented during the conference. Petitioners were not included in the conference inasmuch as they are not parties or intervenors, or *Amicus*.

other evidence in support of its position, and if the interested person or entity wished to file such, was to participate in a telephone conference or meeting with all other interested parties to produce an agreed upon list of exhibits, or where not agreed upon, a brief statement addressing such. All attorneys participating in the hearing were to produce a comprehensive stipulation covering all matters which could reasonably be stipulated, to be filed no later than September 11, 1995, in order to minimize the need to hear unnecessary and repetitive evidence at the hearing.

All named parties, intervening parties and *Amicus* Public Citizen complied with the foregoing protocol. Petitioners declined to participate in the process. The attorneys' fee hearing took place on September 14, 1995.

The record clearly indicates that petitioners' allegations of abuse of discretion are baseless; that it was petitioners who chose not to access the rights provided them by the district court.

In the Sixth Circuit, abuse of discretion is defined as "a definite and firm conviction that the trial court committed a clear error of judgment." *Monette v. AM-7-7 Baking Co.*, 929 F.2d 276, 280 (6th Cir. 1991) (quoting *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989). In the instant matter, the district court committed no error of judgment, let alone a clear error of judgment. The Advisory Committee Notes to Fed. R. Civ. P. 54(d)(2) clearly point out that with respect to issues involving the evaluation of legal services, evidentiary hearings are not required or mandatory[5]; the amount of time for the

5. Not only is it *not* mandatory that a hearing be evidentiary, or that actual testimony and cross-examination take place, a hearing itself is not required. *Building Serv. Local 47 Cleaning Con. v. Grandview*, 46 F.3d 1392, 1402 (6th Cir. 1995) (district court's failure to conduct an evidentiary hearing is not reversible error because a fee application may be decided without a hearing).

preparation of submissions both in support of and in opposition to awards should be tailored to the particular case; that the court may use case management techniques to limit the scope of fee disputes; and that the court is authorized to establish procedures to facilitate the efficient and fair resolution of fee claims. If petitioners suffered any prejudice as a result, it was due to their own doing and own inactivity.

The district court also properly exercised its discretion in denying petitioner-attorneys' request for an award of attorneys' fees and expenses from the class action common fund.

Petitioners first argue that the Hon. S. Arthur Spiegel lacked the jurisdiction and power to deny appellant law firms an award of attorneys' fees because the *Bowling* case had been transferred to the Hon. John F. Nangle. This is a misstatement. Judge Nangle was designated for service in the United States District Court for the Southern District of Ohio "to perform judicial duties . . . in the matter of *Bowling, et al. v. Pfizer, Inc., et al.*, No. C-1-91-256". (Pet. App. at 137). The judicial duties of Judge Nangle were limited to those delineated in the Order of Transfer (Pet. App. at 135) filed August 3, 1995 and the supplemental clarification thereto filed September 1, 1995 (Pet. App. at 11). The issues specifically transferred to Judge Nangle are defined and explicitly set forth in the September 1, 1995 Order (Pet. App. at 11). Nothing contained within the orders of transfer or the original designation for service restricted the trial court's right or power to deny petitioner law firms' applications for awards of fees and expenses. Furthermore, determination by Judge Spiegel of the issue of whether or not petitioners' fee application was meritorious was the more expedient procedure, for the trial court was inherently familiar with the facts surrounding petitioners' application. No error occurred when Judge Nangle assumed the responsibility of conducting the fee hearing and issuing decisions from such hearing, while Judge

Spiegel presided over all other pre-hearing and post-hearing matters. *United States v. Girolamo*, 23 F.3d 320 (10th Cir. 1994).

Petitioners Sidkoff, Pincus & Green, P.C. and Wapner, Newman & Wigrizer requested that the district court award them either $7,500,000 in attorneys' fees or 40% of any gross attorney fee awarded in the event a single award was made which was to be allocated among all counsel entitled to attorneys' fees. The law firm petitioners also requested reimbursement of their costs and expenses. Class counsel and special counsel opposed the requested award for good cause, and the district court denied petitioners' applications upon the basis that appellant law firms did not contribute any financial benefit to the plaintiff class in their activities in the litigation. (Pet. App. at 11). Petitioners appealed the denial. The standard of review for denial of a fee award is abuse of discretion. *Cramblit v. Fiske*, 33 F.3d 633 (6th Cir. 1994).

As is evidenced by the record, the involvement of the petitioner law firms was disruptive and unproductive to the *Bowling* case. Petitioners purposefully impeded the expeditious implementation of the approved settlement with no regard for the best interests of the class. The *Bowling* settlement was and is the only vehicle available to provide any benefits whatsoever for the majority of the world-wide *Bowling* class members. This was made very clear to all involved in the *Bowling* case during the fairness hearings and through the district court's order approving the settlement. Since 1992, the district court attempted numerous times to explain this fact to the petitioner law firms and to clarify for them the jeopardy in which the majority of the class members were placed by the course elected by the petitioners.

Petitioners alleged that, other than Public Citizen, they were the only objectors to the *Bowling* settlement who vigilantly

continued to promote the best interests of the class, and that they should be paid for such. In actuality, petitioner law firms requested that the district court pay them $7,500,000 for their services rendered in presenting continuous specious objections to the *Bowling* settlement and class certification, filing unending meritless appeals, and delaying distribution of settlement benefits for years. The record clearly indicates that all of the petitioners' actions were designed and intended to defeat and delay the *Bowling* settlement and class certification. Had they been successful, there would be no common fund to provide them compensation. Thus, the fee request of the petitioners was unjustifiable and unsupportable. *See Alpine Pharmacy, Inc. v. Chas Pfizer & Co., Inc.*, 481 F.2d 1045, 1054 (2nd Cir.), *cert. denied*, 94 S. Ct. 722 (1973). As the petitioner law firms did not contribute to the maintenance of the common fund, they are not entitled to an award of attorneys' fees and expenses. *Gottlieb v. Wiles*, 150 F.R.D. 174, 185 (D. Colo. 1993).[6]

Petitioners' history of objections to the settlement at the time of the fairness hearing is well-documented by the district court's order approving the proposed settlement and class certification. *Bowling*, 143 F.R.D. at pp. 151-167. Therein the district court addressed and refuted all objections raised by appellants. As the record indicates, petitioners did not state any well-placed objections which instigated or encouraged the settlement enhancements to which defendants agreed. To the contrary, as pointed out by the district court in its order dated

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6. Petitioners have cited to comments made by counsel for defendants and class counsel which were made in conjunction with the mediation of petitioners' first appeal, which was ordered by the Sixth Circuit, in support for their claim that they should be awarded fees as objectors. This mediation is still subject to confidentiality rules, so the reasons for these statements cannot be discussed in detail. However, it can be stated that the statements made were required to be made in conjunction with a negotiated resolution of the appeal which was ultimately unsuccessful.

November 27, 1994 (Pet. App. at 141), since their first involvement, the petitioner law firms have had a continuous misunderstanding of the details of the settlement. Petitioners have, unendingly, made absolutely unsubstantiated accusations of collusion, fraud, and bad faith not only against defendants' counsel and plaintiffs' counsel, but the district court as well. Since 1992, the lower court has repeatedly addressed each and every one of these, and has determined all to be mere "inflammatory accusations". (*Id.* at 150). The district court found the petitioners' claims of future problems with implementation of the settlement to be "wildly speculative predictions" (*Id.* at 148); that their claims of fraud and misrepresentation were meritless and based upon continued misunderstanding of the details of the settlement (*Id.* at 150); that there is "an absence of any real evidence" to support the allegations of collusion and fraud, which allegations the district court carefully studied, reviewed and considered at length prior to determining the settlement to be fair and reasonable (*Id.* at 151), *Bowling* 143 F.R.D. at p. 153 ("this Court has searched for, but not found any evidence that the parties engaged in collusion")[7]; and that the petitioners' allegations that the district court was deceived, are false (Pet. App. at 141, 152-153). Petitioners played no part in creating a single benefit for the *Bowling* class, or any portion of the class action common fund.

Petitioners allege that the *Bowling* settlement was patterned after a document petitioners prepared in their state court case in 1989. There is no merit to this allegation. A document prepared

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7. Additionally, on May 13, 1992, a full and lengthy hearing attended by petitioners addressing their issue of collusion was undertaken by the United States Magistrate. (R. 96: Civil Minutes of 5/13/92 Hearing). On May 14, 1992, the Magistrate found "no evidence from any source indicating that the settlement may be collusive". (R. 97: Transcript of 5/14/92 Hearing, at p. 3). The ruling of the Magistrate was affirmed by the District Court. (R. 122: Civil Minutes of 5/19/92 Hearing, at p.67).

by petitioners and presented to the district court bears no resemblance to the *Bowling* settlement agreement. As pointed out by the district court, if one were to assume this allegation to be true and the settlement was "stolen" from the petitioners, how can the petitioners then continue to assert that the settlement is unfair and unreasonable? *Bowling*, 143 F.R.D. at p. 152. Likewise, if the settlement was designed by petitioners, how can their continued misunderstanding of the details of the settlement (as pointed out by the district court at Pet. App. 141) be explained?

The district court did not abuse its discretion in denying petitioner law firms an award of attorneys' fees and expenses.

Last, petitioners make the extremely generalized statement that the Court's recent decision in *Amchem Products, Inc. v. Windsor*, __ U.S. __, 1997, 1997 U.S. Lexis 4032, No. 96-270 (6/25/97) supports petitioners' allegations that the district court improperly certified the *Bowling* class and improperly approved the *Bowling* settlement. Petitioners reliance upon *Amchem* is misplaced. *Amchem* affirmed the decision of the Court of Appeals for the Third Circuit which, in turn, had cited with approval to the *Bowling* case in its opinion at 83 F.3d 610, 631 (3rd Cir. 1996).

CONCLUSION

It is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

STANLEY M. CHESLEY
Counsel of Record
WAITE, SCHNEIDER, BAYLESS
& CHESLEY CO., L.P.A.
1513 Central Trust Tower
Cincinnati, Ohio 45202
(513) 621-0267

Of Counsel:

FAY E. STILZ
WAITE, SCHNEIDER, BAYLESS
& CHESLEY CO., L.P.A.
1513 Central Trust Tower
Cincinnati, Ohio 45202
(513) 621-0267

Attorneys for Respondents
Plaintiffs' Class, Bowling, et al.

No. 97-47

In The

Supreme Court of the United States

October Term, 1996

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

vs.

PFIZER INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PFIZER INC. AND SHILEY INCORPORATED

DAVID KLINGSBERG
Counsel of Record
MARIS VEIDEMANIS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER, LLP
Attorneys for Respondents
Pfizer Inc. and Shiley Incorporated
425 Park Avenue
New York, New York 10022
(212) 836-8000

Of Counsel:

JAMES R. ADAMS
FROST & JACOBS
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

71679 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED

Under the principle that this Court does not resolve questions not raised in the lower courts, may certiorari be granted to review issues that were *not* before the Sixth Circuit on the current appeal but were raised in two previous petitions for certiorari in this case (Nos. 93-1912 and 94-843), which were denied in *Ridgeway v. Pfizer, Inc.*, 513 U.S. 916 (1994), and *Ridgeway v. Pfizer, Inc.*, 513 U.S. 1103 (1995)?

Should certiorari be granted to review the only issue raised below (other than attorney's fee issues), *i.e.*, the Sixth Circuit's per curiam affirmance of the district court's denial of petitioners' motion to intervene on the ground that it was untimely, where:

— the petition sets forth no "compelling reasons" why this Court should grant review with respect to the denial of intervention, thus failing to comply with Sup. Ct. Rule 10;

— final judgment had already been entered, and there have been seven unsuccessful appeals by these petitioners and two denials of certiorari;

— the settlement has been implemented and petitioners have accepted their share of the proceeds.

Are there any compelling reasons warranting certiorari review of the district court's rulings on petitioners' motions for attorney's fees and related fee hearings?

Have petitioners' numerous and often untimely filings at all three levels of the federal courts created a procedural context so peculiar to this case as to make the issues presented unsuitable for a grant of certiorari?

STATEMENT PURSUANT TO RULE 29.6

Respondent Shiley Incorporated is a wholly-owned subsidiary of respondent Pfizer Inc. Shiley Incorporated has no subsidiaries that are not wholly-owned.

Respondent Pfizer Inc. has no parent company. The following is a list of its direct or indirect subsidiaries (except those that are wholly-owned):

Subsidiary	Place of Incorporation
Anaderm Research Corp.	Delaware
*Community Health Care Solutions LLC	Delaware
*Healthcare Market Research	New York
Laboratoire Beral, S.A.	France
Pfizer Egypt S.A.E.	Egypt
Pfizer Korea Limited	South Korea
Pfizer Limited	Ghana
Pfizer Limited	India
Pfizer Pharm Algerie SPA	Algeria
Pfizer Pharmaceuticals Ltd.	People's Republic of China
Pfizer S.A.	France
PT. Pfizer Indonesia	Indonesia

*50/50 Joint Ventures

This Statement is prepared and dated as of July 30, 1997.

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The Petition for a Writ of Certiorari seeks review of five issues, none of which is appropriate for certiorari.

Issues relating to standing and class settlement approval, raised by petitioners' fifth Question Presented, were not even before the Sixth Circuit in the appeals for which review is sought. Rather, these issues were the subject of petitioners' two prior petitions for certiorari in this case (Nos. 93-1912 and 94-843), which this Court denied on October 3, 1994 and January 9, 1995, and which the petition does not even mention. *Ridgeway v. Pfizer, Inc.*, 513 U.S. 916 (1994); *Ridgeway v. Pfizer, Inc.*, 513 U.S. 1103 (1995). It is well settled that "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). *Accord, Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (a "question . . . not raised in the Court of Appeals . . . is not properly before us").

Only two issues were raised in the Court of Appeals in the order from which certiorari is now sought. The first relates to the district court's denial of petitioners' untimely motion to intervene. Contrary to Sup. Ct. Rules 10 and 14(h), the petition for certiorari does not even present the reasons why review should be granted regarding the denial of petitioners' untimely intervention motion, although this issue is included in petitioners' third and fourth Questions Presented.

In any event, the timeliness of the motion to intervene is a factual and discretionary issue that was properly decided by the district court and is unsuitable for certiorari review. The final judgment approving the settlement was entered long ago, on September 10, 1992. Petitioners have filed seven appeals and two previous certiorari petitions, all of which have been rejected, regarding a class settlement from which they were free to opt out but chose not to do so. The settlement has now been

implemented, including the distribution of proceeds to class members, which were received and accepted by these very petitioners. This unique procedural setting is unlikely ever to be repeated, and thus has little importance to the development of the case law.

The second issue presented in the petition that was decided below (raised in the first and second Questions Presented) relates to the denial of petitioners' application for attorney's fees. This issue, as well, was particular to this litigation and is thus inappropriate for review by this Court.

ADDITIONAL OPINIONS BELOW

The district court's order denying petitioners' motion for reconsideration of the denial of their motion to intervene is reproduced in petitioners' Appendix ("App.") at 141 and reported at 159 F.R.D. 492 (S.D. Ohio 1994). The district court's orders regarding petitioners' motions concerning attorney's fees are reproduced at App. 5-16. The Sixth Circuit's order affirming the district court's orders is reproduced at App. 1. The Sixth Circuit's order denying petitioners' petition for rehearing *en banc* is reproduced at App. 3.

STATEMENT OF THE CASE

A. Procedural Background Set Forth In Opposition To Petitioners' Two Prior Certiorari Petitions.

Many of the following procedural facts were set forth in respondents' briefs in opposition to petitioners' two earlier certiorari petitions, which this Court denied. They are summarized here for the convenience of the Court.

This action was filed on April 19, 1991 on behalf of

recipients of an artificial heart valve, and their spouses. Even though the plaintiffs' valves were functioning normally, they alleged anxiety about the possibility that the device might fail at some unknown future time, as a small percentage had.[1] A settlement agreement was entered into on January 23, 1992. Record ("R.") 48, attachment.[2] The settlement provided not only cash payments, but also medical and health benefits which the overwhelming majority of class members — many of whom are aged and ill from their underlying heart disease — desired and have since received.

Pursuant to Fed. R. Civ. P. 23(e), the district court conducted a fairness hearing on the proposed settlement on June 5, 8-9 and July 22, 1992. Contrary to statements in the Petition (Pet. at 3), the four-day fairness hearing involved a voluminous evidentiary record. *See, e.g.*, R. 161-63, 195-96, 202, 207-08, 225-26, 237, 251. In addition to oral argument, the court received extensive submissions by petitioners and others, including affidavits from medical and damages experts, documents and deposition excerpts. *Id.* Petitioners, other class members and consumer advocacy groups were heard at length. Petitioners themselves submitted seven briefs totaling 369 pages and one letter, with attachments totaling 167 pages. R. 143, 159-60, 190, 221, 228, 235, 242. As a result of suggestions by the court and counsel, the initial settlement agreement was enhanced. Except for petitioners (two implantees and one spouse), all class members who were represented by counsel, along with consumer advocate *amici*, then withdrew their objections in view of the enhancements. *See* R. 251 at 56-61.

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1. Artificial heart valves, made of metal and synthetic materials, are surgically implanted to save the lives of those with diseased and failing human heart valves. Respondent Shiley was a pioneer in developing artificial heart valves, which have saved tens of thousands of lives.

2. Citations to the record are to the district court docket numbers.

On August 19, 1992, the district court issued a 68-page order finding that the settlement is "fair, adequate and reasonable." *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 170 (S.D. Ohio 1992). Judgment was entered on September 10, 1992. R. 255. Petitioners filed a notice of appeal from that judgment on September 17, 1992. R. 258. At no time prior to their filing of a notice of appeal did petitioners move to intervene.

On September 25, 1992, eight days after they had filed their first notice of appeal, petitioners belatedly filed a motion in the district court to intervene for purposes of appeal. R. 265. In an order dated November 9, 1992, the district court concluded that it could not decide the motion to intervene because the filing of the notice of appeal had divested it of jurisdiction. R. 297. Petitioners appealed from that decision as well. R. 305.

On March 2, 1993, while the above appeals were pending, petitioners filed a motion to vacate the judgment pursuant to Fed. R. Civ. P. 60(b)(2), (3) and (6). R. 315. By an order dated March 26, 1993, the district court examined each of the asserted grounds for the Rule 60(b) motion and concluded that there was no basis for it to request a remand from the Court of Appeals. R. 335. The court held that some of the matters raised in the motion "were already considered" in approving the settlement, and that "[m]any of the 'newly discovered' matters . . . were actually known by [petitioners], or with reasonable diligence could have been discovered at the time of the fairness hearing." *Id.* at 241. Petitioners appealed. R. 337. On June 9, 1993, the Sixth Circuit dismissed that appeal because the district court's order declining to request a remand was not an appealable order. 1993 WL 196059, 995 F.2d 1066 (6th Cir. 1993).

In an order dated December 21, 1993, the Sixth Circuit affirmed the district court's order declining to rule on petitioners' motion to intervene, concluding that the district court had no

jurisdiction after a notice of appeal was filed. 1993 WL 533620, 14 F.3d 600 (6th Cir. 1993).

Also on December 21, 1993, the Court of Appeals dismissed petitioners' appeal from the judgment approving the class settlement. App. 299. The Court held that because the petitioners "are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." App. 300. On March 4, 1994, the Court of Appeals denied a petition for rehearing *en banc*. Petitioners then filed a petition for certiorari, which this Court denied on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 513 U.S. 916 (1994).

After petitioners' appeal was dismissed, the district court regained jurisdiction and ruled on the pending motions. On April 5, 1994, the court denied the motion to intervene "because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class." R. 363. Petitioners did not appeal from that order. Instead, on April 13, 1994, they filed a motion in the district court under Fed. R. Civ. P. 59(e) for reconsideration of the denial of their motion to intervene. R. 371.

On April 12, 1994, the district court denied petitioners' Rule 60(b) motion. R. 368. On May 3, 1994, petitioners appealed the denial of that motion. R. 379. Having previously ruled that petitioners lacked standing to appeal from that same judgment, on May 17, 1994 the Court of Appeals issued an order requiring petitioners to show cause why the appeal should not be dismissed. Petitioners then moved the Court of Appeals to remand to the district court for a ruling on their motion for reconsideration of the denial of their motion to intervene.

On August 8, 1994, the Court of Appeals issued an order

dismissing the appeal from the denial of petitioners' motion to vacate the judgment, reasoning that because petitioners were non-party class members whose motion to intervene had been denied, they lacked standing to appeal from the denial of a motion seeking "to vacate the very settlement as to which this court earlier concluded the [petitioners] lacked standing to challenge." R. 404. Petitioners' motion for a remand was denied as moot. *Id.* Petitioners then filed a second petition for certiorari, which this Court denied on January 9, 1995. *Ridgeway v. Pfizer, Inc.*, 513 U.S. 1103 (1995).

B. Subsequent Procedural History.

On November 23, 1994, the district court denied petitioners' motion for reconsideration of the denial of their motion to intervene, holding that "[t]o postpone the benefits of the settlement for another round of appeals would . . . be prejudicial to the members of the class." App. 146. The court further pointed out that intervention would not accomplish petitioners' stated goal of appealing the judgment approving the settlement, because "[t]he time for appeal of that judgment has now passed." App. 149.

On September 5, 1995 the court denied petitioners' application for attorney's fees and their motion to participate in the hearing regarding class counsel's fees. App. 7.

Petitioners appealed to the Sixth Circuit from the orders regarding attorney's fees and denying their motion to intervene. On December 16, 1996, the Court of Appeals affirmed the district court's orders regarding petitioners' application for attorneys' fees and motion to intervene. App. 1. Petitioners' request for rehearing *en banc* was denied on February 28, 1997. App. 3. This latest petition for certiorari seeks review of the Sixth Circuit's order of December 16.

In all, petitioners' contentions regarding the *Bowling* settlement have been rejected by eight different judges of the Sixth Circuit. Not one Sixth Circuit judge has concluded that an *en banc* review was warranted.

REASONS FOR DENYING THE WRIT

I.

THE ISSUES REGARDING PETITIONERS' APPLICATION FOR ATTORNEYS' FEES ARE NOT WORTHY OF CERTIORARI REVIEW BY THIS COURT.

These attorney's fees issues are not worthy of certiorari review because they are discretionary orders based on the unique facts of petitioners' fee application, and have no broader applicability. Sup. Ct. Rule 10; *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121-23 (1994).[3]

II.

CERTIORARI MAY NOT BE GRANTED ON ISSUES THAT WERE NOT RAISED IN THE CIRCUIT COURT AND ARE NOT RELEVANT TO THE ORDERS FROM WHICH REVIEW IS NOW SOUGHT.

This Court should not grant review of the Sixth Circuit's previous orders regarding appellate standing, because the standing issue was not before the courts below and was the subject of two prior certiorari petitions that this Court denied. In addition, the issue is moot as to these petitioners, whose time to appeal has run. Finally, review is unnecessary because the rules of appellate standing are clear and there is no split among the Circuits.

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3. Defendants have taken no position in the courts below with respect to attorney's fees or the conduct of the fee hearings.

A. The Appellate Standing Issue Was Not Before The Courts Below, And Was Already Raised In Two Prior Certiorari Petitions That This Court Denied.

It is well established that "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). *Accord, Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (a "question . . . not raised in the Court of Appeals . . . is not properly before us"). This, petitioners' third petition for certiorari, largely reiterates arguments in the two earlier petitions (Nos. 93-1912 and 94-843) that this Court denied. *Ridgeway v. Pfizer, Inc.*, 513 U.S. 916 (1994); *Ridgeway v. Pfizer, Inc.*, 513 U.S. 1103 (1995). For example, petitioners repeat the same meritless contention regarding a prior Sixth Circuit ruling concerning petitioners' standing; rely upon substantially the same cases; and make the same policy arguments. Pet. at 24-25. This standing issue, however, was not before the courts in the proceedings from which review is now sought.

Petitioners should not be permitted to raise the same issues again and again in repetitive certiorari petitions in the same case. After this Court denied the first petition for certiorari, the district court began implementing the settlement. Now, after two certiorari petitions have been denied, the settlement has been implemented and funds have been distributed to tens of thousands of class members — including petitioners, who accepted them. Eventually, litigation must come to an end. Certiorari should be denied for this reason alone.

B. The Judgment Approving The Settlement Is Final And Unappealable, And The Appellate Standing Issue Is Therefore Moot As To These Petitioners.

Yet another reason why certiorari is inappropriate regarding the appellate standing issue is that the question is moot as to

these petitioners. Their time to appeal from the orders approving the settlement and denying their Rule 60(b) motion has now expired,[4] their appeals have been dismissed and certiorari has been denied. The Court of Appeals correctly determined that petitioners may not retroactively revive their appeals. *See* R. 404 (quoted at App. 150), citing *Jenkins v. Missouri*, 967 F.2d 1245 (8th Cir.), *cert. denied*, 113 S. Ct. 811 (1992) (appeal that is dismissed for lack of standing cannot be revived if appellant later acquires standing after the time to appeal has expired). *Accord, Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 99 (1994) (jurisdiction attained after the deadline for appeal does not "relate back" to an earlier-file defective appeal, because "[t]he time of appealability, having jurisdictional consequences, should above all be clear") (citation omitted). Moreover, even if petitioners could revive their appeal, the settlement that they seek to overturn was approved in 1992 and has already been fully implemented, a process that cannot now be undone.

C. There Is No Split In The Circuit Courts — Every Court That Has Directly Addressed The Question Of Appellate Standing Of Absent Class Members Has Correctly Decided The Issue Consistent With This Court's Precedent And Rule 23.

In addition, review should be denied because there is no split in the Circuits — a point petitioners unsuccessfully argued

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4. Those orders were entered on September 10, 1992 and March 26, 1993, respectively. R. 255, 335. The 30-day period of time to appeal has therefore expired. *See* 28 U.S.C. § 2107(a) ("no appeal shall bring any judgment, order or decree . . . before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree"); Fed. R. App. P. 4(a)(1) ("the notice of appeal . . . must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from").

in prior certiorari petitions.[5] As respondents pointed out in opposition to the two previous petitions, the standing issue was resolved by this Court in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988), which held that under Fed. R. App. P. 3(c) "only parties to a lawsuit, or those that properly become parties [by intervening], may appeal an adverse judgment." Since *Marino*, every Circuit presented with an appeal from a class action judgment brought by non-party class members has ruled that non-party class members — like petitioners — have no standing to appeal. *Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *In re Brand Name Prescription Drugs Antitrust Lit.*, 115 F.3d 456 (7th Cir. 1997) (petition for rehearing filed); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/ Bishop's Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 507 U.S. 908 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988).

These holdings are supported by Fed. R. Civ. P. 23 and 24, which make clear that absent intervention, class members are *not* parties to the action and do not have the unqualified right to participate at every stage of the litigation in the district court and on appeal. Rule 23 sets forth a procedure through which common issues can be litigated efficiently in a single suit, and is structured to enable each class member to have "procedural due process protection[s]" without becoming "fully a party in the traditional sense." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808, 811-12 (1985). Rule 23's goals of manageability and efficiency would be compromised if each class member could individually decide to appeal. Moreover, permitting appeals by non-party class members would be inconsistent with the representative nature of class actions. Finally, an automatic right of appeal by non-party class members without intervention is

5. *See* the petition in Case No. 93-1912 at 12-18 and the petition in Case No. 94-843 at 12-19.

unnecessary to protect their individual interests, because in Rule 23(b)(3) actions such as this class members can protect their interests by opting out and pursuing their own actions.

The cases that petitioners cite to show an alleged "split" either were decided prior to *Marino*[6] or did not directly present the issue. Not one of the post-*Marino* cases on which petitioners again rely granted non-party class members standing to appeal from a judgment approving a settlement in a class action or from an order refusing to vacate such a judgment. *See In re VMS Ltd. Partnership Securities Lit.*, 976 F.2d 362 (7th Cir. 1992) (non-party class members did *not* have standing to appeal a subsequent order implementing a settlement agreement); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1307 n.4 (3d Cir. 1993) ("we need not decide whether different rules apply to objector appellate standing in class and derivative suits"); *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993) (stating in dictum, in an interlocutory appeal from the denial of a class member's motion to intervene, that class members who timely moved to intervene could appeal from a final judgment).

Thus, contrary to petitioners' repeated argument, there is no conflict in the case law, and the rule that has been adopted by every Circuit that has specifically considered the issue is consistent with this Court's precedent and the purpose of Rule 23. Accordingly, even if certiorari were permitted for issues not raised in or pertinent to the Court of Appeals decision from which review is sought, there is no reason to grant review, as this Court already concluded in denying the previous petitions for certiorari.

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6. *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971); *In re Cement Antitrust Lit.*, 688 F.2d 1297 (9th Cir. 1982).

III.

CERTIORARI REVIEW OF THE MERITS OF THE FINAL AND FULLY IMPLEMENTED JUDGMENT IS INAPPROPRIATE AND UNNECESSARY.

Petitioners assert that this Court's decision in *Amchem Products, Inc. v. Windsor*, __ U.S. __, 1997 WL 345149 (June 25, 1997), justifies certiorari review of the final and implemented judgment in this case. Review is not permitted or warranted for three separate reasons. First, the judgment approving the settlement was not before the courts in the proceedings below, and the merits of the judgment were the subject of two prior appeals by these petitioners, for which this Court denied certiorari. Second, under the doctrines of finality and res judicata, plaintiffs cannot seek to reopen the judgment even if there were a change in the case law. Third, the settlement here is entirely consistent with *Amchem*.

A. The Merits Of The Final And Implemented Judgment In This Case Were Not Before The Courts Below.

On this issue as well, certiorari should not be granted to review questions that were not before the lower courts. *Youakim*, 425 U.S. at 234. Petitioners here seek review of a Sixth Circuit decision which only considered and affirmed the district court's denial of their motions regarding attorney's fees and their untimely motion to intervene. The propriety of the judgment approving the settlement, whether in light of *Amchem* or otherwise, was not before the lower courts on those motions, but was the subject of two prior appeals which were dismissed by the Court of Appeals and for which certiorari was denied. *See Bowling v. Pfizer Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), *appeal dismissed*, 14 F.3d 600 (6th Cir. 1993), *cert. denied*, 513 U.S. 916 (1994). Petitioners do not contend or show that any

aspect of *Amchem* has anything to do with the Sixth Circuit order that is the subject of this latest petition. Under these circumstances, petitioners should not be permitted to obtain review of the judgment approving the settlement.

B. The Judgment Is Final And Has Been Implemented.

Certiorari also is inappropriate because the judgment has been final for years, and petitioners' time to appeal the merits of the settlement expired long ago. The settlement — including the distribution of more than $100 million to date — has been implemented, and class members have received payments and other benefits that cannot be returned. The final judgment with respect to the merits of the settlement, and the implementation of the settlement, preclude relitigation and attempts to overturn the settlement at this late date in appeals unrelated to these issues.

Petitioners could not reopen the judgment even if there were a subsequent and controlling change in the governing law (which as shown below has not occurred). Finality is not "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). In *Moitie*, the Court explained that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Id.* at 401 (quoting *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525 (1931)). *See also Barzin v. Selective Service Local Board No. 14*, 446 F.2d 1382 (3d Cir. 1971) (validity of prior decision is not affected by a subsequent contrary judicial decision); *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1851 (1996) (district court abused its discretion in granting Rule 60(b) motion in light of new decisional law).

Here, petitioners were given the opportunity to opt out of the settlement after being notified of its terms, but chose to remain in the class. The settlement has been implemented, and petitioners themselves have accepted their share of the proceeds. The appeal from the judgment approving the settlement has been dismissed and certiorari has been denied. The judgment has been attacked under Rule 60, the attack has been rejected, the appeal from that order has been dismissed and certiorari again denied.

Moreover, the judgment approving the settlement is no less final merely because petitioners have sought to keep this litigation alive through repeated appeals from collateral orders. It is well established that a final judgment for which the time to appeal has expired cannot be re-opened. *See Cherokee Express, Inc. v. Cherokee Express, Inc.*, 924 F.2d 603, 607-08 (6th Cir. 1991) (where appeal was dismissed as untimely, judgment was final for purposes of res judicata and could not be contested in later appeal from contempt order); *Morgan v. Union Metal Mfg.*, 757 F.2d 792, 795 (6th Cir. 1985) (where time to appeal from order of dismissal had expired, plaintiff could not, on appeal from order regarding attorney's fees, raise merits of dismissal order). Petitioners' appeals on the merits of the settlement have been exhausted, and accordingly the settlement cannot be attacked on this appeal from an unrelated order.

C. The Final Judgment Is Consistent With The Standards Set Forth In *Amchem*.

Finally, even if it were appropriate to open the final judgment for further review at this late date, certiorari should be denied because the judgment here is consistent with and, indeed, supported by *Amchem*. The Third Circuit's decision in *Amchem* explicitly cited the *Bowling* settlement with approval, noting the positive aspects of *Bowling* that were not contained in the *Amchem* settlement and led to reversal. *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 631 (3d Cir. 1996).

The *Bowling* settlement had none of the disparities among class members' claims that were present in *Amchem*. Thus, common questions predominated. In particular, *Bowling* involved one product (the Bjork-Shiley C/C heart valve), which had a single alleged defect (possibility of outlet strut fracture), and was manufactured by one defendant "in a similar manner for all the class members." 143 F.R.D. at 158, 159. Further, all class members allegedly sustained the same injury, "emotional distress relating to fear of fracture of a working valve," which was the single claim finally settled for all class members and for which each class member received "an equal cash payment." *Id.* at 150, 149; *see id.* at 158-59. In light of these similarities, "the Defendants' conduct with regard to all implantees arises out of a single nucleus of operative facts and law." *Id.* at 158.

Amchem also stands in stark contrast to *Bowling* on the issue of adequacy of representation and, in particular, "conflicts of interest between named parties and the class they seek to represent." *Amchem*, Opn. at 3, 20. There were no such conflicts within the *Bowling* class or in the terms of the class settlement. The district court fully analyzed the Rule 23(a) requirement of adequacy of representation, and specifically examined "(1) whether the named representatives have common interests with the unnamed members of the class; and (2) whether the named representatives will vigorously prosecute the interests of the class through qualified counsel" — the factors deemed relevant in *Amchem* — but reached the opposite conclusion from *Amchem* for a number of reasons. *Bowling*, 143 F.R.D. at 159.

First, the only alleged conflict raised by petitioners in *Bowling* was between Pennsylvania class members and other class members, which they argued warranted a subclass of Pennsylvania implantees. The district court addressed this objection and found no basis to treat Pennsylvania class members differently because "the law in Pennsylvania looks no more

favorable than any other state" — petitioners have no viable claim for alleged emotional distress regarding a functioning valve. *Id.* at 161 (citing *Brinkman v. Shiley, Inc.*, 732 F. Supp. 33, 34 (M.D. Pa.), *aff'd*, 902 F.2d 1558 (3d Cir. 1989); *see also Angus v. Shiley Inc.*, 989 F.2d 142 (3d Cir. 1993) (affirming summary judgment for defendants where plaintiff's heart valve had not failed and plaintiff alleged no direct physical injury). Notably, petitioners' counsel have acknowledged that their clients decided that "stay[ing] in the case and obtain[ing] the benefits from the *Bowling* settlement" was preferable to the result that they were likely to obtain in their lawsuit in Pennsylvania. App. 145.

Second, in contrast to *Amchem*, the *Bowling* settlement treats all class members alike, providing equal compensation for the single claim it settles. For other potential claims which might be brought by those whose valves fail or who require replacement surgery, there were no releases. Rather, class members received in effect unlimited back-end opt-out rights, permitting them to accept (or reject) guaranteed benefits in the event of a fracture or qualified valve replacement or to pursue litigation for such claims. Indeed, the Third Circuit in *Georgine*, 83 F.3d at 631, distinguished *Bowling* on the basis of its "delayed opt out" provision, indicating that such a provision also should have been incorporated into the *Georgine* settlement. Moreover, while the *Georgine* settlement provided no compensation for spouses, the *Bowling* settlement provides a "$10 million fund to be divided equally among all spouses of implantees." 143 F.R.D. at 170.

Finally, unlike the *Amchem* class action, which "was not intended to be litigated" (Opn. at 6), the district court found that the *Bowling* class action was "actively litigated" prior to settlement, 143 F.R.D. at 153, so that the *Bowling* class was not

burdened by conflicts of interest between named plaintiffs and other class members.[7]

In sum, the merits of the settlement are not before this Court because that was not an issue in the order from which certiorari is sought. In any event, the settlement is unassailable on this appeal, and is not affected by *Amchem*.

IV.

IN VIOLATION OF SUPREME COURT RULE 10, PETITIONERS PROVIDE NO REASONS TO SUPPORT CERTIORARI REVIEW OF THE DISTRICT COURT'S ORDER DENYING THEIR MOTION TO INTERVENE, WHICH WAS AN APPROPRIATE EXERCISE OF THE COURT'S DISCRETION BASED ON THE UNIQUE PROCEDURAL AND OTHER FACTS OF THIS CASE.

Apart from the attorneys' fees issues, the denial of petitioners' motion to intervene was the only issue before the Court of Appeals and therefore the only issue for which petitioners could seek certiorari review. But petitioners do not even attempt to explain why certiorari should be granted with respect to that issue. For that reason alone, certiorari should be denied. *See* Sup. Ct. Rules 10 and 14(h).

Even if this issue were properly raised in the certiorari petition, review should be denied because the district court's decision was a discretionary matter premised on the unique facts of this case. The court correctly exercised its discretion to decide

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7. This Court also raised a concern that notice in *Amchem* was inadequate because some class members may not know of their exposure to asbestos and thus may not realize the potential harm they face. Opn. at 34. This is plainly not a concern in *Bowling*, because class members are undoubtedly aware that they were implanted with a Shiley heart valve.

that petitioners could not intervene as of right or permissively in the *Bowling* class action.

First, intervention at this point would not serve any purpose. Even if petitioners were allowed to intervene, they could not accomplish the avowed aim of the intervention — to challenge the settlement on appeal. Their time to appeal from the orders approving the settlement and denying their Rule 60(b) motion has now expired and, as discussed in Point II, *supra*, the Court of Appeals correctly determined that petitioners may not retroactively revive their appeals. Moreover, even if they could revive their appeal, the settlement they seek to overturn was approved in 1992 and has already been implemented, a process that could not be undone.

The district court correctly ruled that petitioners' motion to intervene was not "timely," as expressly required by both Rule 24(a) and Rule 24(b). "If a [motion to intervene] is untimely, intervention must be denied." *NAACP v. New York*, 413 U.S. 345, 365 (1973).

The district court's finding that the motion was untimely may be reversed only for an abuse of discretion. "Timeliness . . . is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *Id.* at 366 (footnote omitted). As this Court has recognized, non-party class members must "promptly move[] to protect [their] interests" as soon as it is clear that those interests will no longer be protected by the named class representatives. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977) (promptness in moving to intervene upon learning that named plaintiff would not appeal was a "critical fact" in finding intervenors' motion timely). Here, the district court acted well within its discretion in denying intervention to petitioners, who knew long before the settlement was approved

that they would probably seek to appeal but did not move to intervene until after filing their notice of appeal from the judgment and more than two months after the conclusion of the fairness hearing.

It is well settled that a motion to intervene after approval of a class action settlement, such as petitioners' motion, is untimely. *See, e.g., Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 584 (6th Cir.), *cert. denied*, 459 U.S. 969 (1982) (it would be " 'unfair and inequitable' " to postpone " 'the long overdue relief accorded to the plaintiffs and class members . . . by the Consent Decree' "); *Michigan Ass'n of Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981) (same); *Moten v. Bricklayers, Masons & Plasterers*, 543 F.2d 224, 228 (D.C. Cir. 1976) (affirming as "well within the bounds of appropriate judicial discretion" denial of motion to intervene as of right filed after preliminary approval of class settlement); *In re Fine Paper Antitrust Lit.*, 695 F.2d 494, 500 (3d Cir. 1982) (affirming denial of motion to intervene filed after approval of class settlement; "a 'motion to intervene after entry of a decree should be denied except in extraordinary circumstances' ").

Another ground supporting the district court's discretionary ruling that the motion was untimely is that allowing intervention at this late stage would have prejudiced thousands of class members who, as a result of petitioners' endless procedural maneuvers, had to await since 1992 the full benefits of the settlement. As the court concluded: "By far the most compelling reason to deny [petitioners] the opportunity to intervene is to immediately begin the implementation of the settlement. . . . To postpone the benefits of the settlement for another round of appeals would indeed be prejudicial to the members of the class." *Bowling v. Pfizer, Inc.*, 159 F.R.D. 492, 496 (S.D. Ohio 1994), *aff'd*, 103 F.3d 128 (6th Cir. 1996). In contrast, intervention is not necessary to protect petitioners' rights, because they were

free to opt out if they did not like the settlement. Instead, they chose to remain in the class.

Furthermore, petitioners cannot intervene as a matter of right because their right to opt out precludes the requisite impairment of their interests. Intervention as of right is *not available* in opt-out class actions because "a class member who does not consider that he is being represented adequately has the option in a (b)(3) action to opt out under 23(c)(2) or to enter an appearance through counsel of his choosing." *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 332 (5th Cir. 1982). *Accord, Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 289 (N.D. Cal. 1976) ("the ability to opt out precludes the Intervenors from satisfying the impairment-of-interest test"). In view of that option, the judgment could not "impair or impede [appellants'] ability to protect [their] interest," as is required for intervention as of right. Rule 24(a)(2).

The district court also had broad discretion to deny petitioners' motion for permissive intervention under Rule 24(b). *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 294 (6th Cir. 1983). The same reasons — prejudice to class members, lack of prejudice to petitioners, and untimeliness — amply support the ruling on this aspect of the motion. There was no need for intervention, because petitioners were free to opt out but chose not to do so. *Head v. Jellico Housing Auth.*, 870 F.2d 1117, 1124-25 (6th Cir. 1989) (permissive intervention properly denied where the applicant had "other adequate means of asserting her rights" in a separate action). Moreover, petitioners' participation is no longer needed for any purpose: the attorney's fees proceedings in which they sought to participate are finished, and their involvement would not have been necessary or helpful. Petitioners' Rule 60(b) motion, which they hoped to appeal following intervention, has been denied and their appeal dismissed. Petitioners delayed the settlement in this case long

enough. The district court plainly did not abuse its discretion in denying permissive intervention.

Finally, certiorari is inappropriate with respect to the denial of petitioners' motion to intervene, which was based on the specific and unique facts of this case and was well within the discretion of the district court. The court's decision was based on the particular facts and circumstances before it, which present no "compelling reasons" for review. Sup. Ct. Rule 10. Petitioners have not even attempted to show that the court's ruling under those facts gave rise to any reversible error. Certiorari is inappropriate to assess the unique procedural and factual context in which the district court was immersed for several years, upon which it relied in its discretionary denial of the motion to intervene.

V.

PETITIONERS' NUMEROUS MISFILINGS HAVE CREATED A PROCEDURAL CONTEXT WHICH MAKES THIS CASE UNSUITABLE FOR REVIEW BY THIS COURT.

As respondents pointed out in opposition to the prior petitions for certiorari, the unusual procedural posture of this case — which was created by petitioners' numerous misfilings and is unlikely ever to be repeated — makes it unsuitable for review by this Court. As explained in Point I, *supra*, "[a] petition for a writ of certiorari will be granted only for compelling reasons" (Sup. Ct. Rule 10), in cases presenting issues of broad importance to the public and not merely to the litigants. *Ticor Title Ins. Co.*, 114 S. Ct. at 1362; *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

Petitioners' procedural zigs and zags have created a bizarre

set of facts which render this case unworthy of this Court's discretionary review:

• The procedural posture of the case is most unusual, where petitioners again seek certiorari after the Court of Appeals has rejected seven appeals and this Court has twice denied certiorari.

• In repetitive appeals and petitions for certiorari, petitioners have sought to overturn a settlement that they deliberately chose to join and from which they have already accepted monetary and other benefits. Such circumstances, if not unprecedented, are rare indeed.

• Petitioners had their own separate lawsuit (*Taylor*) pending against defendants in the Pennsylvania Court of Common Pleas, which they had been pursuing since 1986. They were free to opt out and pursue that case. Thus, petitioners' rights were adequately protected; they have not been deprived of any substantive right.[8]

• The district court gave petitioners the opportunity to opt out *and* object to the settlement at the fairness hearing. Indeed, the court gave petitioners second and third opportunities to opt out *after* their objections were heard. These opportunities — more than what was required by the Federal Rules — were rejected. Petitioners chose to remain in the class and sought to disrupt and delay the settlement that the class representatives and all other class members desired.

In sum, the atypical facts that resulted from petitioners' procedural maneuvers make this case unsuitable for certiorari review.

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8. Defendants' motion for summary judgment in *Taylor* was recently granted on the ground of *res judicata* because petitioners failed to opt out of the *Bowling* class, as they were free to do. *Taylor v. Shiley Inc.*, No. 2087 (Pa. Ct. Com. Pleas Phila. Co. June 30, 1997) (appeal pending).

CONCLUSION

This petition for certiorari should be denied, as were the last two that petitioners filed in this case.

Respectfully submitted,

DAVID KLINGSBERG
Counsel of Record
MARIS VEIDEMANIS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER, LLP
Attorneys for Respondents
Pfizer Inc. and Shiley Incorporated
425 Park Avenue
New York, New York 10022
(212) 836-8000

Of Counsel:

JAMES R. ADAMS
FROST & JACOBS
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

(4)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

ELIZABETH RIDGEWAY, *et al.*,
Petitioners,

v.

PFIZER, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

GARY GREEN
COUNSEL OF RECORD
LARRY M. KELLER
SIDKOFF, PINCUS & GREEN
1101 MARKET STREET
SUITE 2700
PHILADELPHIA, PA 19107
(215) 574-0600

MORTON B. WAPNER
WAPNER, NEWMAN & WIGRIZER
115 SOUTH 21ST STREET
PHILADELPHIA, PA 19103
(215) 569-0900

ATTORNEYS FOR PETITIONERS

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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ARGUMENT

I. Petitioners' Fifth Question Presented Seeks Review of the Denial of Their Motion to Intervene and Demonstrates the Legal Impact the Ruling Had on Their Standing to Appeal Other Orders.

Contrary to Respondents' argument, Petitioners have indeed sought review here of the Sixth Circuit's denial of their motion to intervene and the legal consequences that denial has on the issue of a class member's standing to appeal. The Class Member Petitioners received court approved notice that required Petitioners to either elect to opt out of the settlement (in which event they would have no right to make objections), or to remain in the class and thereby earn the right to file written objections within a set time.[1] Nothing in the notice mentioned that to appeal the eventual orders of the district court concerning the fairness hearing's procedure, approval of the class certification, or approval of the settlement, it would be necessary for Petitioners to formally move to intervene under Fed.R.Civ.P. 24.[2] Petitioners complied fully with the conditions, did not opt out, filed written objections to the class certification, the hearing's procedures and the settlement. Going one step

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1 According to the notice, only if Petitioners complied with the requirements of filing written objections timely, would their attorneys and they be allowed to participate at the scheduled fairness hearing (R.44).

2 Counsel for the class, who was charged with protecting the rights and options of the absent class members, was the draftsman of the notice approved by the court, and he did not include any reference concerning intervention.

further, Petitioners filed a formal motion "to be heard" which was granted by the district court. *Bowling v. Pfizer*, 143 F.R.D. 141,147(S.D.Ohio 1992).

Prior to and during the fairness hearing, the circumstances pointed to collusion on the part of class counsel and Defendants, and Petitioners sought discovery on this issue.[3] The district court judge who presided over the fairness hearing refused to allow either discovery or the introduction of evidence at the hearing concerning collusion or any of the issues covered by Petitioners' objections.[4]

3

Evidence that was available and that would have been proven by competent evidence (if the court had not prohibited such a record from being made) showed that class counsel had been selected specially by Defendants to launch a "friendly" class action lawsuit that would, at a *bargain-basement-price*, give Defendants litigation peace with regard to a medical device-product that had been the subject of dozens of lawsuits around the globe. Class counsel played no role in structuring the settlement, had no knowledge about the product or the value (or worthlessness) of the settlement to the class, and in fact, took no merits discovery whatsoever prior to submitting the proposed settlement to the court for approval. There was an abundance of other available evidence that class counsel and Defendants forum-shopped to find a specific *friendly* judge who would approve their deal, and that there never was any intention or expectation that the case would be litigated (R.159, 190, 221).

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All depositions that were sought by Petitioners were denied, as was every effort by Petitioners to introduce testimony or other evidence at the fairness hearing. In fact, there was no *evidence* (as defined by the Federal Rules of Evidence) on any material Rule 23-related issue. Ironically, Petitioners had sought to raise issues that this Court found material and indeed governing in *Amchem Products, Inc. v. Windsor* ___ US ___, 1997 WL345149 (U.S.), No. 96-270 (6/25/97) at the fairness hearing, but the district court would hear none of it, and instead, precluded Petitioners from making a record which would have established that this was neither a proper class, nor an honest/fair settlement.

At the fairness hearing, Petitioners participated as if they were parties and were allowed to *argue* (but were prohibited from offering evidence to prove) their objections to: the procedure adopted by the district court; the manner in which the class certification ruling was made; and the fact that the district court would not allow the evidence that existed showing the settlement was neither fair nor fairly obtained, to be entered on the record. Ironically, the district court found in its Opinion approving the settlement that Petitioners did not meet their *burden* of proving fraud, even though it was the district court which denied Petitioners that opportunity.[5]

No party argued during the entire course of the fairness hearing, despite the active and indeed vociferous participation by counsel for Petitioners that Petitioners lacked standing, or that Petitioners were obliged to intervene under Rule 24. Rather, the district court and the parties treated Petitioners as parties, without mentioning or requiring intervention.

Within a few days after the district court entered its Order approving the settlement and class designation, Petitioners filed a Notice of Appeal. By appealing directly, Petitioners relied on two written Opinions of the Sixth Circuit that held class members had standing to file a direct appeal and were not obliged to intervene if they objected to a settlement or class designation. (*See, Sertic v. Cuyohoga Lake, Etc., Carpenters District Council*, 459 F.2d 579 (6th

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Bowling v. Pfizer, 143 F.R.D. at 152-155. No party was permitted to introduce evidence since the district court decided the entire matter on a record which contained nothing but *argument*. The district court further followed the curious practice of allowing the Proponents of the settlement to simply ignore arguments made by Petitioners' counsel concerning the evidence that could be adduced (if the hearing was evidentiary) that pointed to fraud and collusion.

Cir.1972); *Cohen v. Young*, 127 F.2d 721 (6th Cir.1942). However, after Petitioners' Notice of Appeal had been filed, their counsel learned that Respondents intended to file a motion to dismiss the appeal on the grounds that Petitioners had not intervened. Petitioners promptly filed (before the time for appeal had expired) a motion to intervene in the district court.[6]

Petitioners had a pending class action in the Pennsylvania Court of Common Pleas. Because the Sixth Circuit would not allow a direct appeal and suggested Petitioners' remedy for the fairness hearing errors of the district court was a collateral attack, Petitioners attempted to use their state court action as the forum for such a collateral attack, and argued the *Bowling* settlement was not binding or valid on them, raising, in part, due process grounds, fraud and collusion; and requesting an evidentiary hearing in the state court to prove their allegations. Defendants in this case who defended also the Petitioners' Pennsylvania Court of Common Pleas case argued in response that the federal court's order in *Bowling* was *res judicata*, thus precluding any collateral attack. The Court of Common Pleas granted summary judgment to Defendants, rejecting the Sixth

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The district court held that it had no authority to rule on the motion to intervene because of the notice of appeal. Despite the earlier published opinions of the Sixth Circuit (mentioned above), in an unpublished memorandum, the Sixth Circuit dismissed the appeals of Petitioners on the grounds that as unnamed class members, they lacked standing to appeal. The Sixth Circuit cited *Guthrie v. Evans*, 815 F.2d 626 (11thCir.1987) and *Walker v. City of Mesquite*, 858 F.2d 1071 (5thCir.1988) for the proposition that Petitioners' remedy was to attack the order of the federal district court approving the settlement in a state court, collateral proceeding. This Court denied certiorari to Petitioners when they sought review of the Sixth Circuit's orders (R.424).

Circuit's suggestion of a collateral attack.[7]

During the fairness hearing much ado was made in the arguments of both Respondents that although the proposed settlement provided scant monetary relief to class members, it should be approved because Defendants had a so-called policy of not settling with any individual claimants on the one hand, and that the individual claimants had claims of little value due to both legal and factual reasons (143 F.R.D. at 162). Yet, shortly after the court approved the settlement, *The New York Times* and other media reported that over 300 persons who had opted out of the *Bowling* settlement had previously entered into a private deal to receive more than $34 million. Furthermore, this group of opt-outs who were each paid six figure settlements had, *prior to* the fairness hearing, threatened to disrupt the settlement and appear to have been bought off prior to the fairness hearing with the promise of the settlement. Therefore, the Proponents lied to the court and the absent class members when they represented that the class members' cases had no settlement value and that Defendants had a policy of not settling (R.39, 40).

In addition, in attempting to glorify this relatively worthless (to the class) settlement, the Proponents waxed on about the so-called *new* medical research for a diagnostic procedure to detect dangerous heart valves implanted in class members, and argued that only if the court approved the

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7 The Sixth Circuit held that class members had no standing to appeal directly rulings in Rule 23(b)(3) class actions that prejudiced their rights because they had a full remedy in their home state court where the order approving the class and class action could be attacked collaterally. The state court, however, held that the ruling of the district court was final and binding on the class members. In this Petition, Petitioners argue Rule 23 was not designed to create *dead ends* when it comes to protecting the rights of absent class members, which is what the Sixth Circuit created for Petitioners.

settlement would Defendants fund the research (R.325). However, again *after* the *Bowling* settlement was approved, *The New York Times*, *The Washington Post* and other media reported that, contrary to the statements of the Proponents made at the fairness hearing, for a long period of time, Defendant Pfizer already had been financing the very research into diagnostic procedures that the Proponents represented at the fairness hearing would only *commence* if the court approved the settlement . The newspapers reported further that the same diagnostic device that the funds in the settlement were intended to discover, had in fact, at Pfizer's previous expense, been developed and tested on human's with success. The newspaper articles reported also that Pfizer had required the scientists doing the research to *keep quiet* about their findings until after the *Bowling* settlement had been approved.

None of what was reported in the newspapers had been disclosed to the district court (or the absent class) during the fairness hearing, and in fact, the court's opinion approving the *Bowling* settlement relied on findings that the class members had no hope of settling their claims individually on the one hand, and that the research to find a diagnostic tool (that one the district court did not know had already had been invented at the time of the fairness hearing) would be of great benefit to the class.

Petitioners filed a Rule 60(b) motion when they learned of the new information that had been withheld deceitfully from the district court, and their motion pointed to other newly found evidence that established other fraud by the Proponents at the fairness hearing as well (R.315). At the time that Petitioners' Rule 60(b) motion was filed, their earlier-filed motion for intervention was still undecided and was pending. In the motion for intervention, Petitioners grounded their request on the post-settlement approval proceedings that were to occur (and which impacted on them materially), but they also asked that an order allowing them

to intervene relate back to when they first began to participate in the case on the grounds that they had been *de facto* interveners (in accordance with Sixth Circuit cite) on the one hand, and on the other, that the court and all parties had treated them as parties during the entire course of the proceedings.[8]

Finally, the district court got around to ruling on Petitioners motion to intervene, and it was denied. The denial of that motion to intervene was appealed to the Sixth Circuit without success, and it is the subject of this Petition for Certiorari.

In the Sixth Circuit, Petitioners argued that under Sixth Circuit authority, unless there are unusual circumstances (not present here), motions to intervene filed by a class member must be granted since the Sixth Circuit had precluded class members from filing direct appeals. *Bowling v. Pfizer*, Case No. 94-4322. Using that authority, Petitioners argued further that since their motion to intervene was pending when they filed their Rule 60(b) motion, if the Sixth Circuit reversed the district court's ruling denying intervention, Petitioners would thus have been allowed to intervene *as of the time that they had filed their motion to intervene*, and consequently, because the motion to intervene had been filed long before Petitioners had filed the Rule 60(b) motion, Petitioners would have in effect been interveners

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The district court, without ruling on the motion to intervene, entered an order denying Petitioners' Rule 60(b) motion. Petitioners appealed and advised the Sixth Circuit that they had a pending but still undecided motion for intervention. The Sixth Circuit, nonetheless, dismissed the appeal on the same ground that it had dismissed the original appeal: to wit, that class members have no right to appeal anything that a district court judge might do in a Rule 23(b)(3) class settlement or class designation.

when they filed their Rule 60(b) motion. Therefore, if Petitioners were reconstituted as interveners at the time that they filed their Rule 60(b) motion, the Sixth Circuit should reconsider its dismissal of their appeal of the denial of the Rule 60(b) motion since that dismissal was based solely on the lone ground that Petitioners had not been granted intervener status at the time the appeal had been filed. Without uttering one word concerning the merits of Petitioners' appeal of the denial of their motion to intervene, the Sixth Circuit simply affirmed every order issued in the case by the district court.

This case thus comes to this Honorable Court in a posture where the Sixth Circuit erred because it set up inpenetratable barriers for class members who were injured by the rulings of a district court in approving a class action, in its approval of the manner in which the district court conducted a so-called fairness hearing, and in the standard the Sixth Circuit allowed to be used for the approval of a class settlement.[9]

Accordingly, the issue on *certiorari* that Petitioners have standing to raise is whether a circuit court can essentially deny all means of review to class members.

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[9] The Sixth Circuit held that there were two routes of appeal for class members: a collateral attack in a state court or intervention. Yet, in this case, the Sixth Circuit dismissed the appeals of Petitioners, and then, without any explanation, affirmed the denial of their motion to intervene. To make matters worse, the Court of Common Pleas in Pennsylvania established that a collateral attack is not a proper or reliable way to raise errors by a district court in designating a class and approving a settlement. In short, the Sixth Circuit shirked its responsibility to review the district court's orders and passed the issue of reviewing its inferior court's orders to a state court - but the state court declined the Sixth Circuit's invitation. This left Petitioners with no appellate review of the district court's orders whatsoever.

Because the circuits are hopelessly split on what class members' rights of appeal are, and because more importantly, the Sixth Circuit and other circuits have demonstrated a palpable misunderstanding of the entire concept of class action jurisprudence and the court's duties in a class action, this Court must set standards and illuminate the issues. The abuse by a district court of absent class members' rights was recently addressed by this Court in *Amchem*. The district court in *Amchem* had adopted the same view as the district court and Sixth Circuit did in this case. In *Amchem*, this Court held that the way Rule 23 is drafted, requires that the class members' rights be paramount to the benefits to be achieved by a settlement that tramples the rights of absent class members. Accordingly, not only is it necessary for this Court to set forth the proper standard for when and how absent class members can appeal adverse and clearly erroneous rulings by the district court in a class action settlement proceeding, this case is an adjunct to the topics discussed in *Amchem*.

II. Respondents' Replies Are Too Generous in Describing the Fairness Hearing and the Fee-setting Procedures as Contested, Legitimate, Evidentiary, or Protective of the Due Process Rights of Class Members.

Little need be said about the gross exaggerations in Respondents' briefs where they mischaracterize the fairness hearing and fee-settling proceedings as legitimate, adversarial proceedings that were decided by evidence introduced in a setting that protected the due process rights of Appellants. The record itself shows the contrary to be true.

Nothing that qualified as evidence under the Federal Rules of Evidence was allowed to be introduced at either the fairness hearing or the fee setting proceeding. No depositions

or testimony was permitted. Judge Spiegel, who recused himself due to a personal relationship that favored class counsel, came back into the fee setting proceeding and entered an illegal order that determined its outcome. The fairness hearing was replete with the opportunity for Judge Spiegel to hear evidence of collusion by the Defendants and class counsel, but the judge protected his friend, the class counsel he summarily appointed, by barring any inquiry into the issues. Similarly, at the fee-setting proceeding, class counsel's conduct was again made *off limits*.

Respondents' generous descriptions of the fiasco in the court below, notwithstanding the record, reveals the truth.

CONCLUSION

The Court should grant Petitioners' *Writ of Certiorari*.

Respectfully submitted,

/s/_____
Gary Green
(Counsel of Record)
Larry M. Keller
Sidkoff, Pincus & Green
2700 ARAMark Tower
1101 Market Street
Philadelphia, PA 19107
(215) 574-0600

/s/_____
Morton B. Wapner
Wapner, Newman & Wigrizer
115 South 21st Street
Philadelphia, PA 19103
(215) 569-0900

Counsel for Petitioners

Date: August 22, 1997